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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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HILDA L. SOLIS, Secretary, 09-CV-2212
Of Labor, United States
Department of Labor,

Plaintiff,

-against- : US Courthouse
Central Islip NY

SCA RESTAURANT CORP., d/b/a
LUIGI Q ITALIAN RESTAURANT,
a Corporation, and
LUIGI QUARTA, individually
and as Owner,

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE JOSEPH F. BIANCO
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff: US DEPARTMENT OF LABOR
Office of the Solicitor
201 Varick Street, Room 983
New York, New York 10014
BY: DANIEL HENNEFELD, ESQ.
ELENA S. GOLDSTEIN, ESQ.

For the Defendant: RAYMOND NARDO, ESQ.
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1 (Call to Order of the Court.)

2 MR. HENNEFELD: For the plaintiff Secretary of
3 Labor, David Hennefeld.

4 MS. GOLDSTEIN: Elena Goldstein, also for the
5 plaintiff.

6 MR. NARDO: For the defendant, Raymond Nardo.

7 THE COURT: Good morning.

8 We're continuing the trial this morning. We
9 have the same two interpreters from yesterday.

10 Is there anything we need to address before we
11 proceed?

12 MR. HENNEFELD: No, your Honor.

13 THE COURT: You can bring in --

14 MR. NARDO: Judge, I'd like to make one
15 application.

16 I previously made an application based on the
17 fact that the investigator was seeking high 9s to ask
18 about the employee's immigration status and now I see in
19 the papers for the temporary restraining order the
20 government has again referenced the immigration status of
21 the employees.

22 As stated on page 6, *irreparable harm is*
23 *particularly likely to result in this case where the*
24 *immigration status of the employees is unknown.*

25 It is well established that undocumented workers

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1 are not entitled to posttermination backpay or
2 reinstatement even when their termination qualifies as
3 retaliatory conduct. So again, I think that the
4 government has opened the door to that issue.

5 THE COURT: Again, the application is denied.
6 Obviously, that was put in there to try to demonstrate
7 irreparable harm. As a result of that there was a
8 termination, but the fact they put that in there in order
9 to support that particular issue does not mean they opened
10 it up for purposes of the trial generally.

11 MR. NARDO: If I may, judge. But this
12 particular witness is testifying about the retaliation.

13 THE COURT: Do you want to ask him if he is
14 illegally here so that you can -- are you going to try to
15 demonstrate that he is legally here and therefore there is
16 no irreparable harm.

17 Is that why you want to ask him?

18 MR. NARDO: It goes towards the backpay or to
19 the remedies for the temporary injunction that they're
20 seeking in the TRO. And there be would no irreparable
21 harm if he is legal, which would undercut the TRO.

22 THE COURT: Mr. Help if he would or Ms.
23 Goldstein.

24 MS. GOLDSTEIN: Your Honor, there are many
25 issues with Mr. Nardo's explanation so far.

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1 The first is that the Secretary does not and
2 will not seek, with respect to the 15(a)(3) violation for
3 the TR0, any backpay or compensatory relief. The
4 Secretary intends to seek only punitive damages as well as
5 a permanent injunction. On that ground there is no
6 opening of the door with respect to immigration status on
7 the remedies issue.

8 With respect to irreparable harm, the
9 immigration status of these individuals as in these papers
10 is unknown, and inquiry into that immigration status is,
11 for the reasons that the court upheld in the Secretary's
12 previous motion in limine, unduly prejudicial under Rule
13 403. It was justified keeping that material out.

14 In addition, the Secretary's TR0 papers set
15 forth numerous rationales for irreparable harm that rely
16 in no way on the immigration status of the individual
17 employees at issue here.

18 THE COURT: I guess you are not relying then on
19 their immigration status to demonstrate irreparable harm.
20 Is that what I just heard you say?

21 MS. GOLDSTEIN: Your Honor, there are, I think,
22 three reasons why there is irreparable harm in this case
23 justifying an injunction against terminating these
24 employees.

25 The first is that witness intimidation

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1 undermines the effectiveness of the Department's
2 investigation of the Fair Labor Standards Act. It impedes
3 the department's ability to investigate these cases.

4 The second reason is that intimidating witnesses
5 interferes with both the ability of these particular
6 people as well as the other folks in the workplace to come
7 forward and testify in support, which is also irreparable
8 harm.

9 The third justification for irreparable harm is
10 that in the event that these individuals do turn out to be
11 undocumented, they would not be entitled to full relief.

12 Now, I think that that is a supporting reason,
13 and to the extent that --

14 THE COURT: If you are going to use that as a
15 supporting reason, wouldn't you have to identify out then
16 whether in fact they were in that category or not?

17 MS. GOLDSTEIN: If the court needed to reach
18 that, your Honor, but I think that the first two reasons
19 here are sufficient.

20 THE COURT: Okay.

21 MR. NARDO: Judge, if I may just respond to
22 that. Witness intimidation undermines the act. That is
23 what the Secretary of Labor is advancing. And that is
24 true. But I don't see how you get irreparable harm from
25 that.

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1 Irreparable harm is, you need some harm other
2 than monetary damages that is going to be irreparable
3 here. And the fact that witness intimidation is the same
4 as retaliation, you can't retaliate --

5 THE COURT: Wouldn't it be irreparable harm if
6 your clients are firing people who were going to testify
7 in this case to try to prevent them from testifying?

8 Why wouldn't that be irreparable harm if they
9 didn't have those people to testify because they were
10 placed in fear of testifying.

11 Wouldn't that be irreparable harm to the
12 government and their ability to prove this case if all
13 their witnesses refused to comply with the subpoenas
14 because they had all been fired? Isn't that irreparable
15 harm?

16 MR. NARDO: Could be. But he's testified, and
17 the next witness is going to testify. So both witnesses
18 who are alleged to have been a target of this and from
19 whom the irreparable harm is being derived are both here
20 and are both going to testify.

21 THE COURT: That's also because there is a TRO
22 in place that prevents that from happening. But they're
23 not relying on that additional reason. There is no reason
24 to question him if they didn't ask him that on direct and
25 they're not relying upon that for purpose of their

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1 preliminary injunction application.

2 I have been thinking about this whole issue
3 about amending the complaint and it is not clear in my
4 mind how that would work. My belief is, first of all, I
5 haven't gone back and looked, but there hasn't been any
6 adverse action taken. So again, I'm confused as to what
7 the relief would be. To the extent you would want a
8 permanent injunction, if you amend it to include
9 retaliation and the relief you are seeking as a permanent
10 injunction, the injunction would simply basically, the
11 injunction cannot be that they could never fire these
12 workers under any circumstances because that would be too
13 broad. A worker could commit misconduct or some other
14 reason to be fired. Or the store, the restaurant may go
15 out of business. It would only be an injunction that they
16 can't retaliate, basically. So it would be an injunction
17 not to violate the law.

18 And I'm not sure exactly what the purpose would
19 be if, in fact, no retaliation is taken during the trial
20 and the government successfully gets their testimony to
21 amend their complaint. I don't know they could put in an
22 answer. I would have to consider whether I would reopen
23 the trial record to allow them to put on additional
24 evidence on that issue beyond what we have done for
25 purpose of a potential preliminary injunction.

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1 So I don't know exactly how the government
2 intends on pursuing that, or whether they intend to pursue
3 that, but I suggest you think about whether that would be
4 necessary, given the posture that we're in.

5 And I believe that Mr. Quarta, if he didn't know
6 on Thursday or Friday about the law of retaliation, he
7 certainly knows it now. Mr. Nardo has been explaining it
8 to him.

9 So I suggest the government consider all those
10 things and we'll try to figure how any amendment to the
11 complaint would work at this point in this particular
12 case. Okay?

13 MR. HENNEFELD: Yes, your Honor.

14 May we respond further on that when we rest our
15 case?

16 THE COURT: Yes.

17 MR. HENNEFELD: Yes.

18 MR. NARDO: If I could just continue this
19 application.

20 The last point I just want to make is, and just
21 specifically this is on page 5 and 6 of the government's
22 brief. I would only be asking these two witnesses,
23 Mr. Acosta and the next witness, Mr. Cantos Chevez, who
24 either have alleged or will allege some sort of
25 retaliation if your Honor found irreparable harm, and

1 again, from the brief by the government said irreparable
2 harm is particularly likely to result in this case where
3 the immigration status of the employees is unknown.

4 So I think since they are both here, both
5 testifying, they're both going to work, as far as I know,
6 today and thereafter, I think that the immigration status
7 has been put into play for the irreparable harm and that I
8 should be allowed to inquire into that to determine
9 whether or not there is in fact irreparable harm.

10 THE COURT: Okay. But again, I don't want to
11 repeat myself, but the government, whatever is put in
12 their papers as grounds for potential irreparable harm,
13 they are not pursuing that for purposes of the preliminary
14 injunction.

15 It is pretty clear to me, based upon my review
16 of the papers, that, as I said a moment ago, their
17 inability to have these people testify would be
18 irreparable harm in and of itself so that was sufficient
19 for me to issue the TR0.

20 I did not want a situation where all the
21 witnesses were disappearing because your client was firing
22 them before the trial. So that was the basis for me
23 issuing the TR0 and the irreparable harm that I believe
24 was clear.

25 Whether or not again there would be other

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Acosta - for the Plaintiff - Cross/Mr. Nardo

1 irreparable harm, once they testify at this hearing, that
2 would continue to the government wanting to consider that
3 at that point. But they're not to rely upon the
4 immigration status, they just stated that, so I don't
5 believe there is any basis, given their position on that,
6 to allow questioning on that.

7 | Okay?

8 | MR. NARDO: Thank you, your Honor.

9 THE COURT: So let's bring Mr. Acosta back in.

11 | JOSE ANIBAL ACOSTA

15 THE COURT: Mr. Acosta, I remind you that you
16 are still under oath.

17 Do you understand?

18 | THE WITNESS: Yes.

19 | THE COURT: You can be seated.

20 Mr. Nardo, whenever you are ready.

21 MR. NARDO: Thank you, your Honor.

22

CROSS EXAMINATION

24 BY HIRY KARDO.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 A. Good morning.

2 Q. After you testify today, are you going to work at
3 Luigi Q's?

4 A. I don't know. If he allows it I will. But I don't
5 know because I don't know if he will take me back again
6 because he told me that I wouldn't have a job any more.

7 Q. You intend to go to the restaurant after you testify.
8 Correct?

9 A. Yes.

10 Q. Mr. Acosta, have you ever had a conversation directly
11 with Luigi Quarta?

12 A. Yes.

13 Q. And during that conversation -- withdrawn.

14 Does Luigi Quarta speak Spanish?

15 A. Yes.

16 Q. Does he speak Spanish fluently?

17 A. Yes.

18 Q. And it is your testimony that Luigi Quarta has had
19 conversations with you in the Spanish language. Correct?

20 MS. GOLDSTEIN: Objection. Mischaracterizes the
21 conversations.

22 THE COURT: Overruled.

23 A. Yes.

24 BY MR. NARDO:

25 Q. Have you ever received direction from -- withdrawn.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 Did you work at Luigi Q's at the time that
2 Pastor worked there?

3 A. Yes.

4 Q. Did Pastor ever give you directions as to what to do?

5 A. No.

6 Q. Did Pastor ever need an item and ask you to get that
7 item for him?

8 A. Well, I don't know what the question you are asking
9 me is, because in the kitchen he is the chef and if he
10 needs a sauce he tells you bring me such-and-such a sauce,
11 you have to bring it to him because he's in charge.

12 Q. And is that the same -- withdrawn.

13 Is that the same with Enrique, the current head
14 chef?

15 A. Yes. When something has to be brought to him, you
16 have to bring it to him.

17 Q. Did Luigi -- withdrawn.

18 Do you recall signing a statement for the
19 Department of Labor?

20 A. What do you mean? How so?

21 Q. Do you recall meeting Miss Vasquez in the parking lot
22 of Luigi Q's Italian Restaurant?

23 A. With Mrs. Vasquez? Yes. But at the parking lot of
24 the pizzeria next door.

25 Q. How did you know to meet her there at a certain time?

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 A. Well, I don't know. I was having a break and I got a
2 call. And I don't know because some had already gone, so
3 they must have given her my telephone number.

4 Q. So your first communication with Miss Vasquez was her
5 calling you on your cell phone. Is that correct?

6 A. Yes. Yes.

7 Q. What did she say to you?

8 A. Well, they were there and she told me that they were
9 out there and that they were inviting me to come to court.

10 Q. When you say *they*, who are you talking about?

11 A. To her, Mrs. Vasquez.

12 Q. And did you go and speak with Miss Vasquez at that
13 time?

14 A. Yes.

15 Q. Did she have -- withdrawn.

16 Did she take a statement from you at that time?

17 A written statement?

18 A. Yes.

19 Q. And did you sign that statement?

20 A. Yes.

21 Q. Was there anyone there at that time other than
22 yourself and Miss Vasquez?

23 MS. GOLDSTEIN: Objection.

24 THE COURT: What grounds?

25 MS. GOLDSTEIN: To the extent that other

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 informants were there whose identities have not been
2 disclosed, we ask that those identities not be disclosed.

3 THE COURT: Overruled.

4 A. Yes, there were.

5 BY MR. NARDO:

6 Q. Who?

7 A. I do not remember the name of who it was, but there
8 was another guy there.

9 Q. Did he work at the restaurant or was he from the
10 Department of Labor?

11 A. Yes, he worked at the restaurant.

12 Q. And this occurred in January of 2010. Correct?

13 A. Yes.

14 Q. And as you sit here today and you are testifying, you
15 can't remember the name of your coemployee who was meeting
16 with you at that time with Miss Vasquez?

17 MS. GOLDSTEIN: Objection.

18 THE COURT: Sustained.

19 Just go back to the other issue. I think the
20 issue of credibility that would relate to how that
21 information was brought to the Department of Labor and
22 whether it was part of some group effort among employees
23 or a decision made on his own could potentially go to the
24 witness' credibility.

25 Therefore, it is probative under 403, it

Acosta - for the Plaintiff - Cross/Mr. Nardo

1 outweighs any other issue related to the name of the other
2 individual who may have been involved in reporting
3 information.

4 | BY MR. NARDO:

5 Q. So there was one other individual with you from the
6 restaurant at this time. Correct?

7 | A. Yes.

8 Q. Do you remember what position that person had at the
9 restaurant?

10 MS. GOLDSTEIN: Objection.

THE COURT: Overruled.

12 A. Yes.

13 BY MR. NARDO:

14 Q. What was his position?

15 A. Salad man.

16 Q. And do you remember his first name or last name?

17 | A. The name Horacio.

18 Q. Did Horacio give a statement to -- withdrawn.

19 Did Horacio sign a statement before Miss Vasquez
20 at that time?

21 MS. GOLDSTEIN: Objection.

22 | THE COURT: What is the grounds?

23 MS. GOLDSTEIN: Horacio's statement is not at
24 issues in this case.

25 THE COURT: You keep saying it is privileged

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 under the law. But isn't it relevant whether people
2 together giving statements at the same time, if they were
3 providing information at the same time, hearing what
4 someone else was saying? Doesn't that go the issue of
5 credibility, whether he was simply repeating what some
6 other person said or he was providing independent
7 information on his own?

8 MS. GOLDSTEIN: To the extent there was another
9 person there and Mr. Nardo seeks to inquire as to what
10 that person said and the contents of that statement, the
11 government would not have an objection.

12 To the extent that Mr. Nardo seeks to elicit the
13 identity of that individual, the government believes the
14 identity of that individual is and should be privileged.

15 MR. NARDO: If I may respond, judge.

16 During discovery they had all these privileges.
17 Informant privilege was one of them. Once they present
18 their case, once they put the people on the witness stand,
19 it is my understanding that that privilege is waived and
20 that now a search for the truth occurs regardless of who
21 the informants are.

22 MS. GOLDSTEIN: Your Honor, the government is
23 happy to brief this issue that privilege is waived with
24 respect to certainly those individuals who testify but not
25 nontestifying informant witnesses.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 THE COURT: But again, my belief is that it
2 would be relevant if this informant was present for his
3 statement, the same statement at the same time he made
4 these statements, that that would be important in
5 determining the credibility of the witness.

6 And I think that is what this employee was
7 about. I thought he had said that he was there. So I'm
8 going to allow that testimony to that extent, that it
9 doesn't go to potential issues of credibility and whether
10 information would be provided together or separately by
11 each of these individuals.

12 I will allow him to testify that this other
13 individual made statements to Miss Vasquez in his
14 presence.

15 BY MR. NARDO:

16 Q. When you and Mr. Horacio met with Miss Vasquez, were
17 you standing in a parking lot? Were you sitting in a car?
18 Where were you?

19 A. Sitting in a car.

20 Q. Was that the car driven by Miss Vasquez?

21 A. Well, they were there. I don't know if it was there
22 because they stayed back there and I left, so I don't know
23 if it was theirs but they were there.

24 Q. Who was in the car?

25 A. Mrs. Zorayda. There was another guy but I do not

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 remember his name. It was just them.

2 Q. Okay. And the other guy was the person who worked at
3 Luigi Q's. Correct?

4 A. Yes.

5 Q. Did the three of you -- did everyone speak in
6 Spanish?

7 A. Who?

8 Q. Did you and the other employee from Luigi Q's and
9 Miss Vasquez converse in Spanish while you were in the car
10 that Miss Vasquez drove?

11 A. Yes.

12 Q. Did you hear what the other employee, Horacio, was
13 telling Miss Vasquez?

14 A. No.

15 Q. Did Horacio have a conversation with Miss Vasquez in
16 the car while you were in the car?

17 A. I do not remember.

18 Q. Did you have a conversation with Miss Vasquez while
19 Horacio was in the car?

20 A. No.

21 Q. On this day when did you have a conversation with
22 Miss Vasquez?

23 A. What do you mean? Explain it to me a little bit
24 more.

25 Q. Did you speak with Miss Vasquez while you were in the

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 car on that day when you signed the statement?

2 A. Yes.

3 Q. And did Horacio or the other employee also speak with
4 Miss Vasquez that day while you were in the car?

5 MS. GOLDSTEIN: Objection. Asked and answered.

6 THE COURT: Overruled.

7 A. I do not recall.

8 BY MR. NARDO:

9 Q. Do you recall what Miss Vasquez said to you during
10 that conversation?

11 A. Yes.

12 Q. What did she say to you?

13 A. She asked me what time we got in. What time I left.
14 The time for the break. And what time I went back home in
15 the evening.

16 Q. And did she ask the same questions of Horacio?

17 A. I don't know. I don't. I don't know if she asked
18 him the same ones. I don't know.

19 Q. How many seats were in this car?

20 A. Four.

21 Q. Where was Miss Vasquez sitting?

22 A. Always sitting in front. In front, on the driver's
23 side, where the steering wheel is.

24 Q. Where was Horacio sitting?

25 A. Horacio was not there at that moment.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Did Horacio enter the car at some point?

2 A. Yes, he did go in after I left the car.

3 Q. I thought your prior testimony was that all three of
4 you were in the car at the same time.

5 A. I do not remember because the three of us who were
6 there were two attorneys and myself.

7 Q. This was in Miss Vasquez' car?

8 A. Well, as I was telling you, I don't know whose car it
9 was.

10 Q. This was when you were in the car where Miss Vasquez
11 was sitting in the driver's seat, that you have been
12 testifying about?

13 A. Yes.

14 Q. Am I correct that there were three people in that car
15 at one time?

16 A. Yes.

17 Q. And was it Miss Vasquez, you, and Horacio, the other
18 employee?

19 A. No.

20 Q. When you were in the car talking with Miss Vasquez,
21 who was the third person in the car?

22 A. The other guy who was there, I don't know whether or
23 not he was a lawyer but he was in the back.

24 Q. Was he an employee of Luigi Q's?

25 A. No.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Before you went to the car -- withdrawn.

2 Before you went to that part of the parking lot
3 to speak with Miss Vasquez, did any employee of Luigi Q's
4 walk over to the car with you?

5 A. No. No. They were having their break by the tree
6 that is on the parking lot.

7 Q. At some point did you see Horacio there by that car
8 where Miss Vasquez was in the driver's seat?

9 A. Yes, because I saw him go into the car that was
10 there.

11 Q. Was that before you went in or after you went into
12 the car?

13 A. After.

14 Q. And your testimony is that you did not walk over to
15 the car with Mr. Horacio?

16 MS. GOLDSTEIN: Objection.

17 THE COURT: I think you have gone into this,
18 Mr. Nardo.

19 I will let you ask it one more time. Go ahead.

20 A. Yes.

21 BY MR. NARDO:

22 Q. Did you walk back to the restaurant with Horacio?

23 A. No.

24 Q. Did you ever discuss the conversation you had with
25 the Department of Labor on that day with Horacio at any

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 other time?

2 A. No.

3 Q. Before you had that conversation with Miss Vasquez,
4 did you know that the Department of Labor was suing Luigi
5 Q's Italian Restaurant?

6 A. No.

7 Q. So did you find out about this lawsuit when you spoke
8 to Miss Vasquez in the car on that day?

9 A. Yes.

10 Q. And after finding that out, did you go back to the
11 restaurant and have a conversation with any employees
12 about the fact that the Department of Labor was suing
13 Luigi Q's Italian Restaurant and Luigi Quarta?

14 A. No.

15 Q. Were you told not to discuss this with other
16 employees?

17 MS. GOLDSTEIN: Objection.

18 THE COURT: Overruled.

19 A. No -- well, you are asking me the question whether I
20 was told not to say anything?

21 BY MR. NARDO:

22 Q. That's correct.

23 A. We simply did not discuss anything about court
24 amongst us. We did not discuss anything about that, about
25 the court.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Did someone tell you not to discuss it amongst
2 yourselves?

3 MS. GOLDSTEIN: Objection. Asked and answered.

4 THE COURT: Sustained.

5 MR. NARDO: It was asked. I don't believe he
6 answered it.

7 BY MR. NARDO:

8 Q. Did Miss Vasquez ever tell you not to discuss this
9 case with other employees?

10 MS. GOLDSTEIN: Objection.

11 THE COURT: I will allow it one more time.

12 A. No. She did not tell me anything.

13 BY MR. NARDO:

14 Q. Did you discuss this case with Luigi Quarta after
15 this meeting with Miss Vasquez where she was seated in a
16 car?

17 A. What do you mean?

18 Q. After you met with Miss Vasquez in her car in the
19 parking lot -- in a car in the parking lot on that day,
20 and you first learned of this lawsuit against Luigi Q's
21 Italian Restaurant, did you tell Luigi Quarta about this
22 conversation you had with Miss Vasquez?

23 A. No.

24 Q. Did Miss Vasquez tell you not to discuss the lawsuit
25 with Luigi Quarta?

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 MS. GOLDSTEIN: Objection.

2 THE COURT: Overruled.

3 A. No.

4 BY MR. NARDO:

5 Q. Did it ever occur to you that you should tell
6 Mr. Quarta that the Department of Labor was suing him and
7 was interviewing you?

8 A. No.

9 Q. Why didn't you tell Luigi Quarta that you had just
10 met with Miss Vasquez about this lawsuit?

11 MS. GOLDSTEIN: Objection as irrelevant.

12 THE COURT: Sustained.

13 BY MR. NARDO:

14 Q. Did Miss Vasquez tell you that you were not being
15 paid correctly?

16 A. No. Not at that moment.

17 Q. Did Miss -- did she ever tell you that you were not
18 being paid correctly?

19 A. She did not tell me that I was not being paid
20 correctly.

21 Q. Did anyone ever tell you that?

22 A. No.

23 Q. Is it your opinion that you were being paid
24 incorrectly?

25 MS. GOLDSTEIN: Objection.

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 THE COURT: Sustained.

2 BY MR. NARDO:

3 Q. Did Miss Vasquez or anyone from the Department of
4 Labor ever tell you that they were trying to recover money
5 for you?

6 A. No.

7 MR. NARDO: I think I'm up to Exhibit M, judge.
8 I would like to show Exhibit M to the witness, marked I
9 guess for identification. It is a three-page statement.

10 I would like to direct him to the second and
11 third pages.

12 MS. GOLDSTEIN: Your Honor, the record already
13 reflects that this individual cannot so much as even spell
14 his name, so the Department would object to any request to
15 have this individual read the words on the page.

16 THE COURT: Well, this is the statement that he
17 signed.

18 MR. NARDO: His name is written at the bottom of
19 it.

20 THE COURT: I think he is entitled to explore
21 whether his signature was written at the bottom, whether
22 he dotted it in some way. So I will allow it even if he
23 can't read it.

24 BY MR. NARDO:

25 Q. Do you see on the last page of this document your

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 name is written?

2 A. Yes.

3 Q. Did you write your name there?

4 A. Yes.

5 Q. Why did you write your name there?

6 A. Because the woman lawyer -- I mean Zorayda, told me
7 to sign.

8 Q. And were you able to read the statement before you
9 signed it?

10 A. No. She read it to me.

11 Yes, I did, because she read it to me.

12 Q. And after she read it to you, did you sign it?

13 A. Yes.

14 Q. And in that statement it says: *We have not been told*
15 *anything about the investigation.* Withdrawn. Withdrawn.

16 Do you remember Miss Vasquez reading to you a
17 sentence that said: *We have not been told anything about*
18 *the investigation?*

19 A. What do you mean?

20 Q. When Miss Vasquez read the statement back to you, was
21 there a sentence in that statement that said: *We have not*
22 *been told anything about the investigation?*

23 A. Who? I had not been told or who hadn't been? I
24 don't understand.

25 Q. Are you able to read Spanish, Mr. Acosta?

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. Can you look at the second page of that statement.

3 MR. NARDO: Can I direct him to a sentence,
4 judge?

5 THE COURT: Yes.

6 A. But I don't understand that. I don't understand it
7 that way. No.

8 BY MR. NARDO:

9 Q. If I direct you to a certain part --

10 A. I can't read it like that. Only this name. That is
11 my signature.

12 Q. I'm not sure I can read it, either, but do you see
13 here where it says: *No mas*?

14 MS. GOLDSTEIN: Objection, your Honor. He has
15 already testified that he can only read his name.

16 THE COURT: If you want to have the interpreter
17 read a portion of that to him and ask him whether he
18 recalls that being said to him, I will allow that.

19 MR. NARDO: Can you read this sentence,
20 beginning with "*No mas*," to him.

21 (Interpreter confers with witness.)

22 BY MR. NARDO:

23 Q. Do you know what that means?

24 A. I don't know what it means.

25 Q. How many times have you spoken with Miss Vasquez

Acosta - for the Plaintiff - Cross/Mr. Nardo

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1 other than this meeting?

2 A. Twice.

3 Q. And when was that?

4 A. I don't remember the exact date of the second time.

5 I don't remember.

6 Q. What did you discuss on that second occasion?

7 A. The same thing, about what time I started, and she
8 told me that I should tell the truth because, she told me,
9 I was going to be before the judge and so I could not lie.

10 Q. And do you see on that statement before you, do you
11 see at the top of it, it is dated 1/28/10?

12 The top right.

13 A. Here? Yes.

14 Q. And do you see where it says 1/28/10?

15 A. Yes.

16 Q. Mr. Acosta, do you feel awkward having to testify
17 against your current employer, Luigi Q's Italian
18 Restaurant?

19 A. What do you mean?

20 Q. Do you feel uncomfortable testifying against your
21 current employer?

22 A. Uncomfortable?

23 Q. Yes.

24 A. Well, yes, because he's my boss and I did it because
25 he kicked me off the job because he told me don't come

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 back any more, so that's the way it is.

2 Q. And you received a subpoena from the Department of
3 Labor to appear here and testify against Mr. Quarta. Is
4 that correct?

5 A. Yes.

6 Q. Did you receive a check with that subpoena?

7 A. No.

8 MR. NARDO: I have nothing further.

9 THE COURT: Any redirect?

10 MS. GOLDSTEIN: No, your Honor.

11 THE COURT: You can step down, Mr. Acosta.

12 (The witness was excused.)

13 THE COURT: Next witness.

14 Please come up to the witness stand, sir.

15

16 **JUAN CARLOS CANTOR CHEVEZ**

17 called by the Plaintiff, having been first duly
18 sworn/affirmed, was examined and testified (through
19 the Spanish interpreters) as follows:

20

21 THE COURT: Go ahead.

22

23 DIRECT EXAMINATION

24 BY MS. GOLDSTEIN:

25 Q. Good morning, Mr. Chevez.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Good morning.

2 Q. Can you please state your primary language.

3 A. Spanish.

4 Q. Do you speak any English?

5 A. No. A little bit.

6 Q. Well, there is an interpreter here to translate the
7 questions from Spanish to English and back again, so I
8 would ask that even if you understand some of the
9 questions, you just wait until it is translated and then
10 give your answer in Spanish. Okay?

11 A. Okay.

12 Q. Why did you come to court today?

13 A. Because I received a letter that said I had to appear
14 in court.

15 Q. Did you ever work at Luigi Q's Italian Restaurant?

16 A. Yes.

17 Q. How did you get that job?

18 A. Through a friend, Jeffrey Chavez.

19 Q. Did Jeffrey Chavez work at the restaurant?

20 A. Yes.

21 Q. When you first went to the restaurant, who hired you
22 for the job?

23 A. Luigi.

24 Q. And did Luigi tell you anything about the job when
25 you were hired?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Yes.

2 Q. What did Luigi tell you?

3 A. That I would work six days and that he was going to
4 pay me \$400.

5 Q. Was that \$400 --

6 A. And my job was as a dishwasher.

7 Q. And was that \$400 a week?

8 A. Yes.

9 Q. Did Luigi tell you anything about overtime pay?

10 A. No.

11 Q. When did you first start working at the restaurant?

12 A. 2005.

13 Q. And are you currently working at the restaurant?

14 A. Now I am.

15 Q. From 2005 to the present was there a period of time
16 when you did not work at the restaurant?

17 A. Yes.

18 Q. When did you stop working at the restaurant?

19 A. 2009.

20 Q. And about how many months passed before you went back
21 to work at the restaurant?

22 A. About nine months.

23 Q. How did you end up coming back to work at Luigi Q's?

24 A. Because through Jeffrey Chevez, he called me to find
25 out if I could come talk to him because he needed me to

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 come back again to work.

2 Q. Who do you mean by *he*?

3 A. Well, that is to say, Jeffrey called me to tell me
4 that Luigi had asked or had told him that he needed to
5 talk to me to come back to work.

6 Q. What kind of work did you do at the restaurant when
7 you first started?

8 A. Dishwasher.

9 Q. Did your job ever change?

10 A. Yes.

11 Q. What did your job change to?

12 A. Salad man.

13 Q. About how long had you been working as a dishwasher
14 when you started doing the salads?

15 A. About two years later.

16 Q. So were you doing salads before you left in 2009?

17 A. Yes.

18 Q. What is your current job at the restaurant?

19 A. Pasta.

20 Q. When did you start working doing pasta at the
21 restaurant?

22 A. When I returned in 2009.

23 Q. What days of the week do you currently work at the
24 restaurant?

25 A. I'm sorry? I didn't -- please repeat that.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 Q. What days of the week do you work?

2 A. From Monday through Friday through Saturday.

3 Q. And Monday through Friday what time do you start
4 working?

5 A. 10:30.

6 Q. Do you always start working exactly at 10:30 or does
7 the start time change from day to day?

8 A. Always 10:30.

9 Q. Have you ever been told to come in later than 10:30
10 in the morning Monday through Friday?

11 A. No.

12 Q. When you first started in 2005, how did you know what
13 time to come in the morning?

14 A. Because Luigi told me that that was the starting
15 time.

16 Q. And Saturdays what time do you start work?

17 A. 3 o'clock.

18 Q. Have you always started at 3 o'clock on Saturdays?

19 A. Yes.

20 Q. Have you ever been told to come into work later than
21 3 pm on a Saturday?

22 A. No.

23 Q. On weekdays, Monday through Friday, do you take a
24 break during the day?

25 A. Yes.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 Q. What time does your break start?

2 A. 3 o'clock.

3 Q. Do you ever have to keep working past 3 o'clock on
4 weekdays?

5 A. Sometimes I do.

6 Q. Why do you sometimes have to work past 3 o'clock?

7 A. Well, there are times when their friends come and
8 they get there around 2:30 or so and then they take a
9 while to order and because the people get there really
10 late sometimes.

11 Q. About how many times a week or a month do you need to
12 keep working past 3 pm?

13 A. Like once or twice a week.

14 Q. Are you ever able to take a break before 3 pm?

15 A. No.

16 Q. What time does your break end on weekdays?

17 A. 4:30.

18 Q. Other than the break that you have just described, do
19 you take any other breaks Monday through Friday?

20 A. No.

21 Q. And during the whole time you have worked at the
22 restaurant, has this been your break schedule?

23 A. Yes. Now it is.

24 Q. Do you take any breaks on Saturday?

25 A. No.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

186

1 Q. Do you stop working at the exact same time every
2 evening?

3 A. No.

4 Q. Why not?

5 A. Because sometimes it's just the same thing. There
6 are customers who get there a little late and so you end
7 up going past your time. Sometimes.

8 Q. What time do you usually finish work Monday through
9 Thursdays?

10 A. 9 o'clock.

11 Q. Do you ever stay later than 9 o'clock?

12 A. Sometimes I do.

13 Q. Approximately how many times a normal week or a month
14 do you stay after 9 o'clock Monday through Thursday?

15 A. Once or twice.

16 Q. Once or twice a week or a month?

17 A. A week.

18 Q. Do you ever leave before 9 o'clock Monday through
19 Thursday?

20 A. No.

21 Q. What time do you usually finish work on Friday?

22 A. 10 o'clock.

23 Q. Do you ever leave before 10 o'clock on Friday?

24 A. No.

25 Q. What time do you usually finish work on Saturdays?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. 10 o'clock.

2 Q. And do you ever leave before 10 o'clock on Saturdays?

3 A. No.

4 Q. Do you ever leave after 10 o'clock on Fridays or
5 Saturdays?

6 A. Yes.

7 Q. About how often does that happen?

8 A. Like once a week.

9 Q. When you first started, how were you paid, Mr. Cantos
10 Chevez?

11 A. Cash.

12 Q. Are you still paid in cash?

13 A. No.

14 Q. How are you paid now?

15 A. Part by check and the other part in cash.

16 Q. Who pays you?

17 A. Luigi.

18 Q. Has Luigi always paid you since you have worked at
19 the restaurant?

20 A. Yes.

21 Q. When you first started working at Luigi Q's, how much
22 were you paid?

23 A. \$400 per week.

24 Q. And when you received \$400 per week, did you receive
25 exactly that amount or did it vary a bit from week to

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 week?

2 A. Always the same amount.

3 Q. Did your pay ever increase?

4 A. Yes.

5 Q. What did your pay increase to?

6 A. 420.

7 Q. And when did your pay increase to 420?

8 A. When I switched from dishwasher to salad man.

9 Q. And when you say 420, do you mean \$420 per week?

10 A. Yes.

11 Q. During the time you were earning \$420 per week, did
12 you receive exactly that amount each week?

13 A. Yes.

14 Q. Did your pay ever increase again?

15 A. Yes.

16 Q. When did your pay next increase?

17 A. 450.

18 Q. Is that \$450 per week?

19 A. Yes.

20 Q. When did your pay go up to \$450 a week?

21 A. That was still while I was there as a salad man.

22 Q. About how many years or months did you earn \$450 a
23 week?

24 A. For about a year-and-a-half or so.

25 Q. How did you come to receive that raise to \$450 a

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 week?

2 A. Because I told Luigi that I needed a \$30 raise or
3 more.

4 Q. And was it Luigi's decision to give you that raise?

5 THE INTERPRETER: Interpreter correction.

6 It is a \$30 raise, period.

7 MR. NARDO: Objection.

8 THE COURT: Overruled.

9 A. Yes.

10 BY MS. GOLDSTEIN:

11 Q. When you were earning \$450 a week, did you receive
12 exactly that amount each week?

13 A. Yes.

14 Q. How much are you currently paid at the restaurant?

15 A. 550.

16 Q. And is that \$550 each week?

17 A. Yes.

18 Q. And when did you start receiving \$550 each week?

19 A. When I went back there again to the same place.

20 Q. How did you find out what your pay would be when you
21 returned to the restaurant after being gone?

22 A. Because I spoke to Luigi and he told me that that was
23 the pay I was going to get when I returned to work.

24 Q. What language do you use to communicate with Luigi?

25 A. Spanish.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

1 Q. Do you currently earn exactly \$550 each week or does 190
2 it change from week to week?
3 A. No, it's always the same.
4 Q. How do you travel into the restaurant at the start of
5 the workday?
6 A. Bike.
7 Q. Who unlocks the restaurant each day?
8 A. He opens it now.
9 Q. Who is *he*?
10 A. Luigi.
11 Q. And for approximately how long has Luigi been
12 unlocking the restaurant in the morning?
13 A. For about two months.
14 Q. Who unlocked the restaurant before that?
15 MR. NARDO: Objection. Relevance as to who is
16 unlocking the restaurant.
17 MS. GOLDSTEIN: Your Honor, to the extent he is
18 pursuing an executive exemption against the chef, it is
19 relevant as to who has keys and unlocks the restaurant.
20 THE COURT: Overruled.
21 THE INTERPRETER: May the question be repeated
22 for the interpreter?
23 BY MS. GOLDSTEIN:
24 Q. Before the time that Luigi unlocked the restaurant,
25 who would unlock the door?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Omar.

2 Q. Who is Omar?

3 A. The manager.

4 Q. And what was his job?

5 A. To unlock the doors at 10:30, to close up, to take
6 orders, and wait on customers.

7 Q. Is Omar currently working at the restaurant?

8 A. No.

9 Q. When did Omar stop working at the restaurant?

10 A. About two months ago or so.

11 Q. During the time that you worked at the restaurant,
12 have there been managers other than Omar?

13 A. Yes.

14 Q. Can you tell me the name of those other managers?

15 A. Yes. Victoria --

16 THE INTERPRETER: Victorio. Interpreter
17 correction.

18 A. And Vinnie.

19 THE INTERPRETER: May the interpreter clarify?
20 (Conversation with witness.

21 BY MS. GOLDSTEIN:

22 Q. So other than the last couple of months, has there
23 always been a manager working at the restaurant?

24 A. I don't understand.

25 Q. Did Omar, Vinnie and Victorio work at the same time?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Yes.

2 Q. The three people worked together?

3 MR. NARDO: Objection. Asked and answered.

4 THE COURT: Overruled.

5 A. No. Not together.

6 BY MS. GOLDSTEIN:

7 Q. So for some period of time, Omar was the manager.

8 Correct?

9 A. Yes. For now there isn't anybody after that. But
10 first Victorio was there and then Vinnie and after that
11 Omar.

12 Q. What days of the week does the manager work?

13 A. It was always the same schedule.

14 Q. The same schedule as the one that you described for
15 yourself?

16 A. Yes, the same days.

17 Q. Can you describe for the court the kinds of work that
18 you do when you first arrive in the morning.

19 A. Yes.

20 Q. Please go ahead.

21 A. What I do now in the morning is, I start by making
22 vegetables, getting seasonings and sauces ready.

23 Q. When you were a salad maker, what kind of work would
24 you do first thing in the morning?

25 A. Get things ready for the salads, dressings, dessert.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 Q. And when you were a dishwasher, what kind of work did
2 you do first thing in the morning?

3 A. Cleaning the bathrooms and mopping.

4 Q. Earlier you testified that you have worked as a
5 dishwasher, a salad maker, and a pasta cook. Correct?

6 A. Right.

7 Q. Are there any other jobs in the kitchen at the
8 restaurant?

9 A. No. Just that.

10 Q. Is there also a chef who works at the restaurant?

11 A. Yes.

12 Q. What is the name of the current chef?

13 A. Enrique.

14 Q. And how long has Enrique been working at the
15 restaurant?

16 A. For about nine months.

17 Q. What kind of work does the chef do?

18 A. The chef is in charge of cleaning the fish, preparing
19 the meats.

20 Q. What time do the other kitchen workers arrive in the
21 morning Monday through Friday?

22 MR. NARDO: Objection, judge.

23 We are getting down to I think our last witness
24 here. There has been a lot of testimony about when other
25 employees come in. Perhaps we could just restrict this to

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 this employee's hours, since that is what is relevant.

2 MS. GOLDSTEIN: Your Honor, the Secretary is
3 having four witnesses testify on behalf of 12 current and
4 former employees. The issue of representative testimony
5 is important in this case.

6 I'm streamlining this to the extent possible,
7 but it is important that employees be permitted to testify
8 as to the hours of the other positions in the kitchen,
9 particularly given that this individual worked in numerous
10 positions.

11 The testimony is probative on this point.

12 THE COURT: The objection is overruled.

13 A. No, I don't understand what the question was.

14 BY MS. GOLDSTEIN:

15 Q. What time do the other kitchen workers arrive in the
16 morning Monday through Friday?

17 A. At the same time. 10:30.

18 Q. And what time do the other kitchen workers arrive in
19 the morning on Saturdays?

20 A. At the same time. 3 o'clock.

21 Q. And do the other kitchen workers take the same break
22 as you Monday through Friday or is their break different?

23 A. No. At the same time.

24 Q. Do the other kitchen workers leave at the same time
25 as you in the evening?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Sometimes they do but sometimes they don't.

2 Q. Who usually leaves the kitchen first?

3 A. Myself and the chef.

4 Q. And which workers are usually the last to leave the
5 restaurant?

6 A. Anibal and Alex.

7 Q. And what are their jobs?

8 A. Anibal is the dishwasher. And Alex, he gets the food
9 out. He's the foot runner.

10 Q. Have you ever worked with someone named Walter
11 Naranjo?

12 A. Yes.

13 Q. What was Walter's job?

14 A. Pasta man.

15 Q. Was Walter working at the restaurant when you started
16 there?

17 A. Yes.

18 Q. And is Walter currently working at the restaurant?

19 A. No.

20 Q. About how long did you work with Walter?

21 A. For about two years or so.

22 Q. And did Walter work the same schedule as you or was
23 it different?

24 A. The same.

25 Q. Did you ever work with someone named Pastor?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 A. Yes.

2 Q. What was Pastor's job?

3 A. Originally he started out as the pasta man and then
4 he became the chef.

5 Q. Did Pastor work the same schedule that you described
6 previously?

7 A. Yes.

8 Q. Did Pastor have keys to the restaurant?

9 MR. NARDO: Objection.

10 THE COURT: Grounds?

11 MR. NARDO: How would this witness be competent
12 to know whether or not Pastor had keys to the restaurant?

13 THE COURT: He is working there.

14 Based upon your personal observation, do you
15 know whether Pastor had keys to the restaurant.

16 THE WITNESS: He did not.

17 BY MS. GOLDSTEIN:

18 Q. Who hired workers at the restaurant?

19 A. Luigi. Luigi.

20 Q. Did you ever see anyone else hire someone to work at
21 the restaurant?

22 A. No.

23 Q. Who decided that you would be promoted from
24 dishwasher to salads?

25 A. Luigi.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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- 1 Q. How do you know that Luigi made that decision?
- 2 A. Because Pastor said to me that Luigi had said to him
- 3 to promote me to salad man.
- 4 Q. Did Pastor ever change your hours at the restaurant?
- 5 A. No.
- 6 Q. Did you ever see Pastor suspend or send home a
- 7 worker?
- 8 A. No.
- 9 Q. To your knowledge does the restaurant keep track of
- 10 the exact hours that you work?
- 11 A. No.
- 12 Q. Do you currently punch a time clock?
- 13 A. No.
- 14 Q. Have you ever punched a time clock at the restaurant?
- 15 A. No.
- 16 Q. Have you ever heard a manager at the restaurant say
- 17 anything about the Department of Labor's investigation?
- 18 A. Yes.
- 19 Q. Can you explain.
- 20 A. Yes.
- 21 On one occasion I overheard Vinnie say that if
- 22 the Department of Labor ever went there, if we were asked
- 23 how many hours we work or what time did we start, we were
- 24 to say that we only worked five days; that we started at
- 25 11 o'clock and that sometimes we left at 8:30; and that my

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 day off was also Wednesday.

2 Q. Who did Vinnie say this to?

3 A. To myself, right there in the kitchen.

4 Q. Was anyone else present?

5 A. I actually do not remember.

6 Q. And do you know when this conversation happened?

7 A. I don't have the exact date, but it was about a
8 year-and-a-half or so ago.

9 Q. Have you ever worked only five days a week at the
10 restaurant?

11 A. No.

12 Q. In the last several days, has anyone at the
13 restaurant asked you if you were coming to testify in
14 court?

15 MR. NARDO: Objection. Leading.

16 THE COURT: Overruled.

17 A. Yes.

18 BY MS. GOLDSTEIN:

19 Q. When was the first time in the last several days that
20 someone at the restaurant asked you if you were planning
21 to testify here?

22 A. The first time was like on Tuesday or so.

23 Q. And can you explain to the court what happened on
24 Tuesday or so.

25 A. Well, that was the first time when Luigi asked us

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 which day we were going to come to the court.

2 Q. And what did you say to Luigi?

3 A. That I had to come here on Monday.

4 Q. Did Luigi say anything else to you?

5 A. No. But later on, later on, like on Thursday or so,
6 he asked us again if we were going to come.

7 Q. Let's talk about that Thursday conversation.

8 A. Right.

9 Q. Who did you speak to on Thursday about testifying in
10 court?

11 A. Luigi approached the chef and told him to ask us
12 which exact date we had to come to court.

13 Q. What happened then?

14 A. And then he came over to me, the chef, and he asked
15 me and I told him that my day was Tuesday.

16 And then he told him to go and ask Anibal and
17 the others which day they also had to come. And after
18 that Anibal went over to him and told him that his day was
19 Monday.

20 And then when he told him that his day was
21 Monday, then he came over and told the chef that if we
22 were going to come to court, we would only have work there
23 until Saturday.

24 Q. And when you say *he*, who are you referring to?

25 A. Luigi.

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 Q. Did anyone else say anything to you about coming to
2 court on Thursday?

3 A. Yes.

4 Q. Can you explain.

5 A. Yes.

6 After that happened, Alex came over on behalf of
7 Luigi, he came over to the kitchen to tell Anibal and
8 myself that he should convince us not to come to court.

9 Q. Why do you say that Alex came on behalf of Luigi?

10 A. Because he told it to us.

11 Q. Did Alex say that he was acting on Luigi's direction?

12 MR. NARDO: Objection. Hearsay, judge.

13 MS. GOLDSTEIN: Your Honor, 801(d)(2).

14 THE COURT: Yes. This is clearly admissible.

15 Luigi is the owner and his direction is clearly
16 admissible.

17 A. Yes. Alex said to us that Luigi was sending word to
18 us.

19 BY MS. GOLDSTEIN:

20 Q. Did anyone say anything to you about testifying on
21 Friday?

22 A. Yes.

23 Q. Can you explain.

24 A. Yes.

25 Alex said to me again to please not to come to

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 court and he asked me whether I had any recording.

2 Q. Did Alex mention Luigi Quarta to you on Friday?

3 A. Yes.

4 Q. What did Alex say about Luigi Quarta to you on
5 Friday?

6 A. That he was saying to him to tell us and convince us
7 not to come.

8 Q. Just to clarify. Luigi was telling Alex to convince
9 you not to come?

10 MR. NARDO: Objection. Leading.

11 THE COURT: Overruled.

12 A. Right.

13 BY MS. GOLDSTEIN:

14 Q. On Saturday did anyone at the restaurant say anything
15 to you about testifying?

16 A. Yes.

17 Q. What happened on Saturday?

18 A. On Saturday, at the end of the working day, the chef
19 came over to us and he said that Luigi was sending word
20 that the decision to come to court was up to us. We would
21 either come to court or we would go to work.

22 Q. Did the chef say anything else?

23 A. No. That was it.

24 Q. Did the chef say anything about your job and whether
25 you would have a job after you testified?

Chevez - for the Plaintiff - Direct/Ms. Goldstein

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1 MR. NARDO: Objection.

2 THE COURT: Overruled.

3 A. I spoke with him and he said to me that, according to
4 what he had said, that if we showed up in court then we
5 exactly would not have a job any more.

6 BY MS. GOLDSTEIN:

7 Q. And when you refer to what *he* said, are you referring
8 to Luigi Quarta?

9 A. Yes. Because he was the one who told him.

10 Q. Luigi Quarta was the one who told the chef. Correct?

11 A. Yes. Right.

12 Q. What is the chef's name?

13 A. Enrique.

14 Q. Can you tell the court how you felt when the chef
15 told you that you might not have a job.

16 MR. NARDO: Objection.

17 THE COURT: I will allow it under the assumption
18 there was pressure exerted or intimidation. It is being
19 asked that way, I think, so I will allow it.

20 A. Well, I felt like being under pressure and afraid,
21 because I was saying to myself do I go, do I not go,
22 because he had already said that if we put in an
23 appearance we wouldn't have a job any more.

24 I felt afraid, nervous. Yes.

25 MS. GOLDSTEIN: Nothing further, your Honor.

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 THE COURT: Let's take our morning ten-minute
2 break and then we will resume.

3 (Recess taken at 11:25 am.)

4 THE COURT: Proceed, Mr. Nardo.

5 MR. NARDO: Thank you.

6

7 CROSS-EXAMINATION

8 BY MR. NARDO:

9 Q. Good morning, Mr. Chevez.

10 A. Good morning.

11 Q. Do you recall speaking with Miss Vasquez at the
12 Department of Labor?

13 A. Yes.

14 Q. Do you recall speaking with her by phone?

15 A. Yes.

16 Q. Do you recall at some point she gave you a statement
17 to sign?

18 A. Yes.

19 Q. On the first occasion you spoke with her, did you
20 discuss with her the hours that you worked for Luigi Q's
21 Italian Restaurant?

22 A. Yes.

23 Q. And did you discuss the hours you worked with --
24 withdrawn.

25 Did you discuss with Miss Vasquez the hours you

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 worked, on the second occasion you spoke with her?

2 A. Yes.

3 Q. And were the hours you worked referred to in the
4 written statement that you signed?

5 A. Yes.

6 Q. Was your first conversation with her on September 29,
7 2008?

8 A. I don't recall exactly.

9 MR. NARDO: I'm up to Exhibit N.

10 May I approach the witness?

11 THE COURT: Yes.

12 BY MR. NARDO:

13 Q. I ask the witness to look at Defendant's Exhibit N,
14 and specifically if he could look at the fifth page.

15 Do you see the date at the top of that page,
16 where it says 9/29/08?

17 | A. Yes.

18 Q. And then, if you move ahead to the page before that,
19 do you see where it is dated 10/6/08? The fourth page in.

20 A. Yes.

21 Q. And then do you see the second page in where the date
22 is 12/3/08?

23 A. Yes.

24 Q. On that second page it has your signature at the
25 bottom. Correct?

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. So if you had conversations with the Department of
3 Labor on September 29 of '08, October 6 of '08 and
4 December 3 of '08, did it ever occur to you to keep track
5 of the hours you were working, in writing?

6 MS. GOLDSTEIN: Objection.

7 THE COURT: Sustained as to form.

8 BY MR. NARDO:

9 Q. After you had these communications with the
10 Department of Labor, did you ever take any steps to keep
11 track of the hours you worked at Luigi Q's, in writing?

12 A. Honestly, I didn't.

13 Q. So when you testify about the hours you worked, you
14 are testifying from your memory. Is that right?

15 A. Yes.

16 Q. Do you have a smartphone?

17 A. No.

18 Q. Did Luigi Quarta speak Spanish?

19 A. Yes. He speaks a little.

20 Q. How often would he converse with you in Spanish?

21 A. Sometimes when he needed me to make him an order of
22 food the way he likes it, then he would explain it to me.

23 Q. And he would do that in Spanish?

24 A. Yes.

25 Q. Was he fluent in Spanish?

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 A. When he talks to me, yes.

2 Q. And would you agree that Pastor was in charge of the
3 kitchen?

4 A. In charge of the kitchen?

5 Q. Yes.

6 A. Yes. He was like the one in charge. The chef was in
7 charge.

8 Q. And when you were the salad man, did Pastor supervise
9 you?

10 A. Yes, because he was exactly the one who would say to
11 me when I was a salad man make me this, make a salad, make
12 some dressing, like that.

13 Q. When you were the pasta chef, did he supervise you?

14 A. No.

15 Q. Did Pastor ever supervise the dishwasher?

16 A. No.

17 Q. When you were the dishwasher, did Pastor, or the chef
18 at the time, ever ask you to bring them things?

19 A. No.

20 Q. And when you were the pasta chef, did Pastor tell you
21 what pastas to make?

22 A. No.

23 Q. Did Pastor ever review the pastas before they were
24 sent to the customer?

25 A. Sometimes he did.

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Did you ever see Pastor get upset with an employee in
2 the kitchen?

3 A. No.

4 Q. When you first started working at Luigi Q's, you
5 agreed to compensation of \$400 a week. Is that right?

6 A. Yes.

7 Q. And then that salary went from \$400 to \$450 to \$550 a
8 week. Is that right?

9 MS. GOLDSTEIN: Objection.

10 MR. NARDO: Let me withdraw that.

11 BY MR. NARDO:

12 Q. That compensation went from \$400 a week to \$450 a
13 week to \$550 a week. Is that right?

14 A. Yes. But first it was \$420, then 450, and then after
15 that 550.

16 Q. Were you thankful that your compensation was being
17 raised?

18 MR. HENNEFELD: Objection. Relevance.

19 THE COURT: Sustained.

20 BY MR. NARDO:

21 Q. Did you ever express thanks to Mr. Quarta after he
22 gave you a raise in compensation?

23 MS. GOLDSTEIN: Objection.

24 THE COURT: Sustained.

25 BY MR. NARDO:

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Were you ever upset when Mr. Quarta gave you a raise
2 in compensation?

3 MS. GOLDSTEIN: Objection.

4 THE COURT: I will allow it.

5 Do you want to ask him if he ever complained to
6 Mr. Quarta about his compensation? That I will allow.

7 MR. NARDO: Fine.

8 BY MR. NARDO:

9 Q. Did you ever complain to Mr. Quarta about your
10 compensation?

11 A. I don't understand the question.

12 Q. Did you ever complain to Mr. Quarta that you weren't
13 making enough money?

14 A. Yes.

15 Q. And did he give you a raise after that?

16 A. Yes.

17 Q. Did you ever complain to Mr. Quarta that you weren't
18 being paid overtime?

19 A. No.

20 Q. Did you ever complain to Mr. Quarta that you weren't
21 being paid the minimum wage?

22 A. No.

23 Q. And you told the Department of Labor that you were
24 not being paid overtime. Correct?

25 A. Yes.

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 Q. How come you never said to Mr. Quarta that you
2 weren't being paid overtime?

3 MS. GOLDSTEIN: Objection.

4 THE COURT: I will allow it.

5 A. Because I didn't know.

6 BY MR. NARDO:

7 Q. Well, you found out from the Department of Labor that
8 you weren't getting paid overtime. Correct?

9 A. Yes.

10 Q. After that how come you didn't complain -- withdrawn.

11 After you found out from the Department of Labor
12 that you weren't receiving overtime, how come you didn't
13 bring that up with Mr. Quarta?

14 A. Because I didn't know.

15 Q. Okay. Why don't you take a look at your statement.

16 The second page of your statement. Do you see -- can you
17 read Spanish?

18 A. Yes.

19 Q. Do you see in that statement, towards the end, where
20 it says: *I am not paid overtime for hours worked?*

21 MR. NARDO: May I approach to show the witness,
22 judge?

23 BY MR. NARDO:

24 Q. Do you see that sentence?

25 A. All I see is where it says I'm paid a salary of 400.

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 Q. Look at the next sentence.

2 A. My work hours. I'm sorry, counsel?

3 Q. Look at the next sentence.

4 A. *I am not paid overtime.*

5 Q. And that was a statement that you signed. Correct?

6 A. Yes.

7 Q. And that was on December 3, 2008.

8 A. I don't remember. I don't have that date in my
9 memory. I don't remember.

10 Q. It's on the top right of the document. Do you see
11 where it says 12/3/08? The same page.

12 A. 12? 12/3/08?

13 Q. Okay. So does that indicate that as of December 3,
14 2008 at least, you knew that you were not being paid
15 overtime?

16 A. Yes.

17 Q. After December 3, 2008, why didn't you discuss with
18 Luigi Quarta the fact that you weren't being paid
19 overtime?

20 A. Because I didn't know whether or not I was working
21 overtime hours or if there was any overtime.

22 Q. And did you ever form a conclusion as to whether or
23 not you worked overtime hours?

24 A. Yes.

25 Q. When was that?

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Well, when I spoke with the Department of Labor, I
2 spoke with them and they did the math and I was working
3 overtime hours.

4 Q. When did you learn that?

5 A. From the first time that I spoke with them.

6 Q. Okay. And after that did you ever discuss with Luigi
7 Quarta the fact that he wasn't paying you overtime hours?

8 MS. GOLDSTEIN: Objection.

9 BY MR. NARDO:

10 Q. Or overtime pay?

11 THE COURT: Sustained. I think he answered this
12 already.

13 BY MR. NARDO:

14 Q. Now, at some point you left for another employer.

15 You left Luigi Quarta to work for another employer.

16 Correct?

17 A. Yes.

18 Q. What was the period -- and then you came back to work
19 for Luigi Quarta. Correct?

20 A. Yes.

21 Q. What was the period of time that you worked for
22 another employer rather than Luigi Quarta?

23 A. I had about nine months when I did not work for him.

24 Q. And again, you are testifying from your memory about
25 that?

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. Did you ever have a vacation when you worked at Luigi
3 Quarta's?

4 A. Yes.

5 Q. How many weeks per year did you have a vacation at
6 Luigi Quarta's?

7 A. One week per year.

8 Q. Did you ever miss any days working at Luigi Quarta's
9 because you were sick?

10 A. No. I missed one day because I had to go run an
11 errand in New Jersey and so the car broke down and I did
12 not bring my phone along so I was not able to call him and
13 tell him that I cannot get back to work.

14 That was the only day that I did not come in.

15 Q. And when you worked at Luigi Quarta's, aside from the
16 break from 3 to 4:30, wasn't there another break you had
17 to eat dinner while you worked there?

18 A. No.

19 Q. When you quit Luigi Quarta's, did you tell Pastor you
20 were quitting?

21 MS. GOLDSTEIN: Objection. The witness has not
22 testified as to whether he quit or was terminated.

23 THE COURT: You might have to clarify that,
24 Mr. Nardo.

25 MR. NARDO: Sure.

Chevez - for the Plaintiff - Cross/Mr. Nardo

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1 BY MR. NARDO:

2 Q. For the period of time that you weren't working at
3 Luigi Quarta's, how did it come about that you were no
4 longer working there?

5 A. Well, because when I stopped working there it was
6 because Luigi had told Pastor to call me and tell me that
7 I did not have a job there any more.

8 Q. Did you hear about that from Luigi or did you hear
9 about that from Pastor?

10 A. Through Pastor.

11 Q. And when you were recruited to work again for Luigi
12 Q's, did you receive a phone call from Pastor?

13 A. No. From Jeffrey.

14 Q. Have you ever seen Luigi cook for customers at the
15 restaurant?

16 A. No.

17 Q. And does the restaurant use time cards?

18 A. No.

19 Q. You testified that -- withdrawn.

20 Is Enrique, the chef, also called Rico?

21 A. Yes.

22 Q. And you had a conversation with Rico about your
23 testimony in court last week. Correct?

24 A. Yes.

25 Q. And Rico is the head chef who replaced Pastor.

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1 Correct?

2 A. Yes.

3 Q. And at some point you felt pressure and afraid about
4 testifying here today. Correct?

5 A. Yes.

6 Q. And the government sent you a subpoena to be here
7 today. Correct?

8 A. Yes. I received a letter.

9 Q. And as you sit here today, do you believe that Luigi
10 Q's Italian Restaurant or Luigi Quarta owes you money for
11 wages?

12 A. No, I don't know.

13 MR. NARDO: I have nothing further.

14 THE COURT: Redirect?

15 MS. GOLDSTEIN: No, your Honor.

16 THE COURT: You can step down. Thank you, sir.

17 (The witness was excused.)

18

19 THE COURT: Next witness.

20 MR. HENNEFELD: Your Honor, if I just may have
21 two minutes briefly to connect the projector for the next
22 witness.

23 THE COURT: Sure.

24 (There was a pause in the proceedings.)

25 MR. HENNEFELD: May we do some very brief

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1 housekeeping on the record before the next witness?

2 THE COURT: Sure.

3 MR. HENNEFELD: I have discussed with
4 defendant's counsel there are some other exhibits that we
5 have agreed that defendants have no objections on.

6 THE COURT: Okay.

7 MR. HENNEFELD: Those are Exhibits 10, 10A, and
8 11.

9 THE COURT: Okay.

10 Is that correct?

11 MR. NARDO: Yes, your Honor.

12 THE COURT: Okay. Plaintiff's Exhibit 10, 10A
13 and 11 are admitted.

14 (Plaintiff Exhibits 10, 10A, and 11 in
15 evidence.)

16 MR. HENNEFELD: Thank you. May I call the next
17 witness?

18 THE COURT: Sure.

19 MR. HENNEFELD: Secretary calls Zorayda Vasquez.

20
21 **ZORAYDA VASQUEZ**

22 called by the plaintiff, having been first duly
23 sworn/affirmed, was examined and testified as
24 follows:

25 THE COURT: Go ahead, Mr. Hennefeld.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 MR. HENNEFELD: Thank you, your Honor.

2 DIRECT EXAMINATION

3 BY MR. HENNEFELD:

4 Q. Miss Vasquez, who is your employer?

5 A. The United States Department of Labor, the Wage and
6 Hour Division in the Long Island district office.

7 Q. When did you first start working for the Wage and
8 Hour Division?

9 A. I first started June 23, 1997.

10 Q. What is your position with Wage and Hour?

11 A. I'm an investigator.

12 Q. How long have you held that position?

13 A. It is going to be 15 years in June.

14 Q. And as an investigator, what are your duties?

15 A. My duties are, as an investigator I investigate firms
16 to establish compliance with the federal labor laws
17 pertaining to minimum wage, overtime, recordkeeping, and
18 child labor.

19 Q. What languages do you speak?

20 A. I speak Spanish and English.

21 Q. Approximately how many investigations do you conduct
22 per year?

23 A. I would say approximately between 10 and 20 cases.

24 Q. And what was your role in this case, Luigi Q's
25 Restaurant?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. I was an investigator that was assigned the case
2 Luigi Q's Restaurant.

3 Q. And approximately when did you begin your
4 investigation of the defendant's restaurant?

5 A. It was approximately June of 2006.

6 Q. I'm sorry. You testified June of 2006. Can you
7 clarify that?

8 A. Can you repeat that question please?

9 Q. Approximately when did you begin investigating Luigi
10 Q's Restaurant?

11 MR. NARDO: Objection, your Honor.

12 A. Approximately June --

13 MR. NARDO: Asked and answered.

14 A. -- 2006.

15 THE COURT: Overruled. We have had it twice
16 now.

17 BY MR. HENNEFELD:

18 Q. Miss Vasquez, during your investigation of Luigi Q's
19 Restaurant, did you interview any employees of the
20 restaurant?

21 A. Yes, I did.

22 Q. And when you interviewed employees of the restaurant,
23 did you interview the employees together, in a group, or
24 separately?

25 A. All my interviews were separately.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. Do you typically interview employees in your
2 investigations?

3 A. Yes.

4 Q. And why do you do that?

5 A. To find out the hours that they work; how they are
6 being paid. And it is basically to determine compliance
7 with the federal labor laws, make sure they're getting
8 paid correctly.

9 Q. And is employee cooperation important to your
10 investigations?

11 A. Yes, very important.

12 Q. How so?

13 A. Well, without the employees' interviews, basically I
14 have no case.

15 The law is very crucial that we speak to the
16 employees to make sure how they're getting paid and, you
17 know, they are getting paid overtime and if they are
18 getting paid compliance.

19 Q. In cases where the employer hasn't kept complete and
20 accurate records, does that affect the importance of
21 employee cooperation?

22 A. Oh, yes. Very important.

23 Q. How so?

24 A. Because, I mean, if I have bad records, I need to do
25 interviews from the employees. And if I have inaccurate

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 or falsified records from the employer, then it is very
2 important for me to get good interviews from the
3 employees.

4 Q. Was it important to have employee cooperation in this
5 case?

6 A. Yes, very important.

7 Q. Why?

8 A. Because the employer did produce falsified records.
9 They were bad records.

10 Q. In your experience when an employer threatens not to
11 participate in a Department of Labor case, does that
12 affect employee cooperation?

13 A. Yes.

14 Q. How so?

15 A. Well, without the employee interviews, I basically
16 have no case.

17 Q. Miss Vasquez, during your investigation of the
18 restaurant, did you ever visit the restaurant?

19 A. Yes.

20 Q. And why did you visit the restaurant?

21 A. Because I was assigned the case of Luigi Q's to
22 investigate.

23 Q. And what did you do at the restaurant for your
24 investigation?

25 A. I interviewed employees. I met with the employer. I

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 reviewed payroll and time records. And I also conducted
2 surveillance.

3 Q. Can you explain what you mean by surveillance.

4 A. I observed. I watched.

5 Q. What did you watch?

6 A. I observed employees coming in and out of the
7 restaurant.

8 Q. And why did you do that?

9 A. Because I needed to confirm their statements as to
10 their arrival time to work and the time that they took
11 their breaks.

12 Q. And when you made these observations, where were you
13 watching from?

14 A. I was at the parking lot behind the restaurant.

15 Q. If you were behind the restaurant, how did you
16 observe employees coming and going to the restaurant?

17 A. There is a back door to the restaurant where I saw
18 when the employees were coming in. They were traveling in
19 bicycles and they were coming through a back door from the
20 restaurant.

21 Q. Did you ever observe employees of the restaurant
22 arriving there in the morning?

23 A. Yes.

24 Q. Approximately how many times did you observe
25 employees arriving at the restaurant in the morning?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. I would say five or more times. Five-plus times.

2 Q. What did you see when you observed employees at the
3 restaurant arriving in the morning?

4 A. When I saw the employees, I saw them coming in
5 bicycles. They would park the bicycles behind the
6 restaurant and then I would see that they were cleaning
7 the back of the restaurant, they were sweeping the back of
8 the restaurant, or they were wiping the glass for the
9 restaurant.

10 Q. At what time did you observe employees of the
11 restaurant arriving there in the morning?

12 A. It was between 10:30 to 11.

13 Q. That is the time when you observed employees arrive
14 at the restaurant?

15 A. Yes.

16 Q. Did you ever observe employees of the restaurant
17 arrive later than 10:30 in the morning?

18 MR. NARDO: Objection. Judge, she just said
19 between 10:30 and 11.

20 THE COURT: Overruled.

21 BY MR. HENNEFELD:

22 Q. Do you need me to repeat the question?

23 A. Repeat the question, please.

24 Q. Did you ever observe employees of the restaurant
25 arriving later than 10:30 in the morning?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. No.

2 Q. You just testified a moment ago about observing
3 employees performing some activities at the restaurant in
4 the morning.

5 Approximately what time was it when you saw
6 employees performing those activities at the restaurant?

7 A. It was between 10:30 and 11 am.

8 Q. Did you ever do surveillance of the restaurant in the
9 afternoon?

10 A. Yes.

11 Q. Did you ever observe employees of the restaurant
12 exiting the restaurant in the afternoon?

13 A. Yes.

14 Q. And where were you watching from when you observed
15 that?

16 A. From the parking lot in the rear of the restaurant.

17 Q. And where did you observe employees exit from?

18 A. The back door from the restaurant.

19 Q. At what time did you observe employees of the
20 restaurant exiting the restaurant in the afternoon?

21 A. Between 3 and 3:30.

22 Q. Did you ever observe employees exiting the restaurant
23 earlier than 3 in the afternoon?

24 A. No.

25 Q. And did you ever observe employees reentering the

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 restaurant in the afternoon?

2 A. Yes.

3 Q. At what time did you observe employees reentering the
4 restaurant in the afternoon?

5 A. At 4:30 pm.

6 Q. Did you ever observe employees reentering the
7 restaurant later than 4:30 in the afternoon?

8 A. No. Never.

9 MR. HENNEFELD: Bear with me one moment, your
10 Honor.

11 May I approach the witness briefly?

12 THE COURT: Yes.

13 BY MR. HENNEFELD:

14 Q. Miss Vasquez, if you can open the -- before looking
15 at the screen, if you can, open the exhibit binder and
16 look at Plaintiff's Exhibit 1.

17 Do you recognize Plaintiff's Exhibit 1?

18 A. Yes.

19 Q. What is it?

20 A. This is a request for business data. This is a form
21 that I had given Luigi Quarta to complete when I first met
22 with him.

23 Q. And did you receive back a completed form from the
24 employer?

25 A. Yes.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. Now if you can look at whatever is easier for you to
2 look at, on the screen or reading the paper. If it's
3 easier for you to look on the paper, that's fine.

4 If you can, look at page 3. Do you see at the
5 bottom of page 3? It says: *I attest that the above*
6 *information is true and correct to the best of my*
7 *knowledge and belief?*

8 A. Yes.

9 Q. Do you see where it says that?

10 A. Yes.

11 Q. Is there a signature below that?

12 A. Yes.

13 Q. Whose signature?

14 A. Luigi Quarta.

15 Q. And looking near the bottom of page 3, do you see the
16 question: *Who is in charge of setting pay and time*
17 *policies for the business?*

18 A. Yes.

19 Q. What was the response to that question?

20 A. *Luigi Quarta, President.*

21 Q. Looking near the top of page 3, do you see the
22 question: *Any extra pay premiums for working over a*
23 *certain number of hours in the week and/or pay period?*

24 A. Yes.

25 Q. And what was the response to that question?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. He responded No.

2 Q. If you can turn the page 2. I'm looking to page 2 on
3 the screen as well. You can stay on the paper. If you
4 look at page 2, near the middle of the page, do you see
5 the question: *Are time records kept?*

6 A. Yes.

7 Q. What was the response to that question?

8 A. Luigi responded No.

9 Q. Also looking at page 2 in the list of the
10 restaurant's employees, how did Mr. Quarta describe his
11 position at the restaurant?

12 A. As executive chef.

13 Q. Now on the issue of time records. Did the employer
14 ever provide any time records during this case?

15 A. Yes.

16 Q. Now, if you can, turn to Plaintiff's Exhibit 5 in the
17 exhibit binder.

18 Do you recognize the documents in Exhibit 5?

19 A. Yes.

20 Q. What are they?

21 A. These are time records provided by Luigi Quarta.

22 Q. And have you reviewed the time records in Exhibit 5?

23 A. Yes.

24 Q. And is Exhibit 5 a true and accurate copy of the time
25 records that were produced by the defendants during this

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 case?

2 A. Yes.

3 MR. NARDO: Judge, I'm going to object to this
4 line of questioning.

5 Again, we stipulated in paragraph 15, during the
6 period of June 5, 2006, through at least May 21, 2009, the
7 defendants did not keep written records of the hours
8 worked by their employees. And now we're having testimony
9 about what we have already stipulated does not exist,
10 written records of the hours worked by the employees.

11 THE COURT: Mr. Hennefeld.

12 MR. HENNEFELD: Your Honor, I believe this issue
13 was addressed yesterday, that the production of falsified
14 time records is relevant to the issue of willfulness as
15 well as the issue of the recordkeeping violation, and
16 those are the purposes for which we offer this exhibit.

17 THE COURT: When were these records produced, if
18 you recall, Miss Vasquez?

19 THE WITNESS: The copies? It was received on
20 December of 2008.

21 THE COURT: Again my ruling, the objection is
22 noted for the record, but notwithstanding the stipulation
23 that they did not keep written records of hours worked,
24 for the purposes of this it is for the government to try
25 to demonstrate that false records were produced to the

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Department of Labor, and that certainly would go to the
2 issue of willfulness.

3 Therefore, it is admissible notwithstanding the
4 stipulation that they did not keep written records of
5 hours worked.

6 These are not being offered as true records.

7 They're being offered as false records.

8 So you're offering these?

9 MR. HENNEFELD: Yes, your Honor, we move to
10 admit Exhibit 5.

11 THE COURT: 5 or 6?

12 MR. HENNEFELD: No. This is Plaintiff's trial
13 Exhibit 5. The *Exhibit 6* sticker is from a deposition.

14 THE COURT: Okay. So Trial Exhibit 5 is
15 admitted.

16 (Plaintiff Exhibit 5 in evidence.)

17 MR. NARDO: If we concede on the issue of
18 willfulness, would you not admit these documents and
19 similar documents?

20 THE COURT: You are going to concede that your
21 client willfully violated --

22 MR. NARDO: To the extent you have to make this
23 determination of willfulness.

24 THE COURT: I do.

25 MR. NARDO: We're not conceding that he violated

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 the act, but you are going to see payroll records, all
2 sort of records.

3 THE COURT: I don't understand. You said we're
4 not conceding that he violated the act, but you are
5 conceding that he did willfully? I don't understand that.

6 MR. NARDO: You have to find whether or not he
7 violated the act and for which employees. But we are
8 willing to concede that, to the extent you find a
9 violation if we can dispense with the payroll records and
10 these records and other records, we will concede to
11 willfulness.

12 THE COURT: Mr. Hennefeld?

13 MR. HENNEFELD: Your Honor, could you give me
14 one moment?

15 THE COURT: Yes.

16 (There was a pause in the proceedings.)

17 THE COURT: That is hard for me. You are not
18 conceding that he violated the law, but are willing to
19 concede that he did violate the law and he did it
20 willfully?

21 MR. NARDO: If you find a violation of law, then
22 we will concede to willfulness if we can keep these
23 exhibits -- we have got payroll records, all sorts of
24 other records here -- if we can keep them out.

25 MR. HENNEFELD: Your Honor, we are happy to

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 attempt to streamline, but we don't see how we can accept
2 a stipulation of willfulness without a stipulation to the
3 violations, themselves.

4 THE COURT: Yes. I'm a little reluctant to do
5 that. I'm not sure that that would work.

6 You can't concede there was a willful violation
7 but say there wasn't a violation at all.

8 MR. NARDO: Willfulness is an additional
9 penalty, liquidated damages, so it is whether or not you
10 are going to double the award, if any, that you find.

11 We are willing to concede that if you find that
12 there is any violation of the FLSA you can double the
13 penalty on willfulness to the extent willfulness applies
14 to that violation, as a tradeoff for keeping all these
15 financial documents out and streamlining the case.

16 MR. HENNEFELD: Your Honor, just to clarify one
17 thing.

18 Mr. Nardo stated that willfulness is relevant to
19 liquidated damages, but just to clarify, its relevance to
20 statute of limitations whether it is two or three years.

21 THE COURT: You concede also then to three
22 years?

23 MR. NARDO: Yes, your Honor, as a tradeoff for
24 just keeping these exhibits relating to payroll, relating
25 to hours, relating to time records, all that.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 THE COURT: I guess, okay.

2 MR. HENNEFELD: Your Honor, if the defendant
3 would also stipulate to having produced falsified time
4 records to the Department of Labor in an attempt to show
5 compliance, that is something that is more specific and
6 concrete, that would work in lieu of going through these
7 records.

8 THE COURT: Show compliance. What do you mean
9 by that?

10 MR. HENNEFELD: In an effort to simulate
11 compliance; in an effort to attempt to convince the
12 government that they were in compliance.

13 MR. NARDO: Judge, that is a finding that is
14 made in order to get to the conclusion of willfulness.

15 We are willing to concede or stipulate on the
16 willfulness, so you don't need to find it. You have the
17 stipulation. You don't need the witnesses. You don't
18 need the documents. You don't need --

19 THE COURT: What would the falsification of
20 records go to other than willfulness, is the question?

21 MR. HENNEFELD: The violation.

22 THE COURT: Do you also concede the
23 recordkeeping violation as well?

24 MR. NARDO: Yes, your Honor, in return for all
25 the financial data and time records not being in evidence.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 MR. HENNEFELD: Again, your Honor, we are not
2 comfortable with stipulating the willfulness without the
3 underlying violation and the willfulness. In the event
4 that the violation is found, that is not something that we
5 have ever done and this is a lot to add up.

6 THE COURT: We're going to take a lunch break
7 anyway for a criminal matter that I have to handle, so you
8 can think about it over the lunch break. We will
9 reconvene at 1:45.

10 (Lunch recess taken at 12:45 pm.)

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Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A F T E R N O O N S E S S I O N .

2 2:15 PM

3

4 THE COURT: Notwithstanding your desire to
5 streamline things by conceding willfulness, I think it is
6 too unorthodox to continue to dispute the violation itself
7 by trying to concede willfulness.

8 I don't know if there is any case law that would
9 be applicable to that type of thing because it is a pretty
10 unusual concession. So in an abundance of caution,
11 because one of the last things I want to do is to redo
12 this someday, I'm going to allow them to put on the proof
13 of willfulness.

14 In light of that stipulation, I don't know how
15 long you anticipate this witness to be, but I would try to
16 streamline it, given that there doesn't appear to be any
17 dispute that if there is a violation, that it was willful.

18 I think that is the best way to deal with the
19 situation. Okay?

20 What happened to your witness?

21 MR. NARDO: Judge, we would like to call
22 Richard Gluszak out of order. He is here and has other
23 things to do.

24 THE COURT: Okay.

25 MR. NARDO: So if it is okay, I will call

Gluszak - for the Defense - Direct/Mr. Nardo

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1 Richard Gluszak.

2 THE COURT: Okay.

3

4 EVIDENCE FOR DEFENSE

5

6 RICHARD GLUSZAK

7 called by the defense, having been first duly
8 sworn/affirmed, was examined and testified as
9 follows:

10

11 DIRECT EXAMINATION

12 BY MR. NARDO:

13 Q. Good afternoon, Mr. Gluszak. Do you know Luigi
14 Quarta?

15 A. Yes, I do.

16 Q. How long have you known him?

17 A. Approximately ten years.

18 Q. Are you familiar with his restaurant, Luigi Q's?

19 A. Yes.

20 Q. Did you have an office near there?

21 A. My office was right next door to the restaurant.

22 Q. And did you go to the restaurant often?

23 A. Frequently. Almost every day.

24 Q. Were you an attorney for Luigi Quarta at some point?

25 A. Yes, I was.

Gluszak - for the Defense - Direct/Mr. Nardo

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1 Q. Did you have an advisory role with the restaurant?

2 A. Yes, I did.

3 Q. How often were you at the restaurant? Over four
4 years?

5 A. Almost every day that the restaurant was open. And
6 sometimes on Sunday I would meet with Luigi and go over
7 paperwork.

8 Q. Were you familiar with Mr. Quarta's operations?

9 A. Yes.

10 Q. And what years were you in some sort of advisory role
11 with Luigi Q's Italian Restaurant?

12 A. I believe it was from 2001 through 2007. Some point
13 in time in 2007.

14 Q. During that period of time, were you familiar with
15 the hours of the restaurant?

16 A. Yes, I was.

17 Q. What time would employees report to the restaurant
18 Monday through Friday?

19 MS. GOLDSTEIN: Objection. Personal knowledge.

20 THE COURT: Is this based upon your own
21 observations?

22 THE WITNESS: Yes, it is, your Honor.

23 THE COURT: I will allow it then.

24 A. The employees would come in in a steady fashion. The
25 first one in might be the chef or the assistant chef, and

Gluszak - for the Defense - Direct/Mr. Nardo

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1 he would be followed by waiter and dish washer.

2 Generally speaking, there wouldn't be anyone
3 there until about 11 o'clock, 11:15.

4 BY MR. NARDO:

5 Q. And then when would the last employee arrive to work,
6 from your observations?

7 A. The last employee would probably be around 11:30,
8 20 to 12.

9 Q. Did Luigi personally see customers at the restaurant?

10 A. Either Luigi -- usually Luigi, but if he was in the
11 kitchen, he would have, you know, a waiter that would also
12 accommodate them.

13 Q. Mondays through Fridays, was there a time at which
14 Mr. Quarta would stop seating people?

15 A. He generally would stop seating people around 8 pm
16 because he didn't want to rush their meal and have the
17 kitchen open too late.

18 Q. And so did you ever observe a customer come to the
19 restaurant after 8 o'clock on Monday through Friday?

20 A. Several times.

21 Q. What occurred?

22 A. He wouldn't seat them. Even if he knew them well or
23 they called on the way, he would say if you can't get here
24 by 8 o'clock I can't accommodate you.

25 Q. Did you observe employees leave the workplace --

Gluszak - for the Defense - Direct/Mr. Nardo

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1 A. Yes.

2 Q. -- on Monday through Friday?

3 A. Yes, I did.

4 Q. What time would employees leave the work place?

5 A. The employees would start leaving somewhere around
6 9 o'clock.

7 What he -- what would happen is, whoever came in
8 first between the chef and the assistant chef, they would
9 normally be the first one to leave because they opened up;
10 or opened up the kitchen. That would start somewhere
11 around 9. And by, I guess, 10 o'clock, the place would be
12 emptied out of employees.

13 Q. And what about on Saturdays? What time -- did you
14 observe -- did you ever make observations as to what time
15 employees left the restaurant on Saturdays?

16 A. Yes. Saturdays they would be open a little later.
17 They would start leaving maybe around 9:45. By 10:30
18 there wouldn't be any employees left.

19 Q. Were there times when the employees would leave
20 earlier on Saturdays?

21 A. Definitely. There was a period of time that the
22 restaurant wasn't doing well -- I don't know how it's
23 doing now -- but Luigi would close early because there was
24 no need to keep the doors open.

25 Q. And on Mondays to Fridays were there times when the

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 employees would leave before 9 pm?

2 A. Definitely.

3 Q. And why did that occur, according to your
4 observations?

5 A. Because there would be very few patrons in the
6 restaurant.

7 Q. Did you at some point receive the mail for Luigi Q's?

8 A. Yes. Because my building was next door, we had the
9 same mailman.

10 There were numerous occasions where the mail
11 would come, the mailman knew us both so he new that I was
12 involved in an advisory capacity, so he would leave the
13 mail for Luigi with me, especially on Saturdays in tax
14 season, when the restaurant wasn't open until Luigi would
15 get there around 3 pm.

16 MR. NARDO: I have nothing further.

17 THE COURT: Cross-examination.

18

19 CROSS-EXAMINATION

20 BY MS. GOLDSTEIN:

21 Q. Good afternoon, Mr. Gluszak.

22 A. Good afternoon.

23 Q. My name is Elena Goldstein and I represent the
24 Department of Labor in this case.

25 Mr. Quarta had filed a lawsuit against you.

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 Correct?

2 A. Yes, he did.

3 Q. And Mr. Quarta claimed that you misrepresented
4 something accounting-wise in that lawsuit. Correct?

5 MR. NARDO: Objection, judge. Beyond the scope
6 of the direct.

7 MS. GOLDSTEIN: Your Honor, this goes to his
8 credibility and motive for testifying today.

9 THE COURT: I will allow it.

10 A. To my recollection, Luigi commenced a lawsuit for
11 accounting fees and to collect the balance of a personal
12 loan that he had made to me.

13 BY MS. GOLDSTEIN:

14 Q. Did Mr. Quarta claim that you misrepresented
15 something accounting-wise in that lawsuit?

16 A. I don't recollect that.

17 Q. You gave a deposition in this case. Correct,
18 Mr. Gluszak?

19 A. Yes, I did.

20 Q. You came to the Wage/Hour office in Westbury.
21 Correct?

22 A. Yes.

23 Q. And there was a court reporter there who wrote down
24 what you said?

25 A. Yes.

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 Q. You swore to tell the truth. Correct?

2 A. Yes, I did.

3 Q. The same oath that you swore today?

4 A. Yes.

5 Q. And at that deposition, on Page 33, line 25, through
6 Page 34, line 6, do you recall being asked the question:

7 *What was that suit for?*

8 And giving the answer:

9 *It was basically, there was a loan between us,
10 was one of the items. There was a claim, I guess, for
11 misrepresentation accounting-wise or malfeasance
12 accounting-wise.*

13 MR. NARDO: Objection. Misread.

14 MS. GOLDSTEIN: I'm sorry.

15 *It was basically for, there was a loan between
16 us, was one of the items. And there was a claim for, I
17 guess, misrepresentation accounting-wise or malfeasance
18 accounting-wise.*

19 BY MS. GOLDSTEIN:

20 Q. Do you recall giving that -- being asked that
21 question and giving that answer?

22 A. Vaguely I recall, yes.

23 Q. You defaulted in that lawsuit. Correct?

24 A. Yes, I did.

25 Q. And you didn't defend yourself in that lawsuit

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 because attorney-client privilege, in your words, meant
2 that you couldn't put on a proper defense without
3 violating privilege. Correct?

4 A. Correct.

5 Q. And you swore under oath that attorney-client
6 privilege was the reason you did not respond to that
7 lawsuit?

8 MR. NARDO: Objection.

9 THE COURT: What is the objection?

10 MR. NARDO: He just testified under oath that
11 attorney-client privilege is the reason.

12 THE COURT: Next question.

13 BY MS. GOLDSTEIN:

14 Q. Luigi Quarta has a judgment against you. Correct?

15 A. Yes.

16 Q. And that judgment is for more than \$500,000.
17 Correct?

18 A. Yes, it is.

19 Q. So is it fair to say that you owe Mr. Quarta more
20 than half a million dollars?

21 A. Whatever the judgment says.

22 Q. Is it fair to say -- the judgment is for more than
23 half a million dollars. Correct?

24 A. Correct.

25 Q. So it is fair to say that you owe Mr. Quarta more

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 than half a million dollars. True?

2 A. Correct.

3 Q. You used to have access to the restaurant's debit
4 card. Correct?

5 A. Yes.

6 Q. And you would sometimes use that debit card if you
7 went to the supermarket?

8 MR. NARDO: Objection.

9 MS. GOLDSTEIN: Your Honor --

10 THE COURT: Relevance?

11 MR. NARDO: Yes.

12 MS. GOLDSTEIN: Again, your Honor, this goes to
13 his credibility.

14 THE COURT: I think the nature of his
15 relationship to Mr. Quarta and the restaurant goes to the
16 potential advisory capacity, so I'm going to allow it.

17 BY MS. GOLDSTEIN:

18 Q. So you sometimes used the restaurant's credit card
19 when you went to the supermarket. True?

20 A. Yes. For my own use as well as the restaurant.

21 Q. And you sometimes used that restaurant's debit card
22 when you filled up your car. Correct?

23 A. Correct.

24 Q. Now, it has been years since you've set foot in the
25 restaurant. Correct?

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 A. Yes.

2 Q. You haven't been to the restaurant since 2007?

3 A. 2007.

4 Q. And that was five years ago?

5 A. Correct.

6 Q. So you don't know if the restaurant's schedule has
7 changed in that time. Correct?

8 A. No, I don't.

9 THE COURT: I'm sorry. I didn't hear the
10 answer.

11 THE WITNESS: I have no idea.

12 BY MS. GOLDSTEIN:

13 Q. And it is certainly possible that in the last five
14 years the restaurant's hours of operation have changed?

15 MR. NARDO: Objection.

16 THE COURT: Sustained. I think he answered he
17 has no idea.

18 BY MS. GOLDSTEIN:

19 Q. You don't have any personal knowledge as to the time
20 that the restaurant's workers arrived in 2008. Correct?

21 A. No.

22 THE COURT: No, that's not correct, or you have
23 no knowledge?

24 THE WITNESS: No, I have no personal knowledge.

25 BY MS. GOLDSTEIN:

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 Q. And you have no personal knowledge as to what time
2 they arrived in 2009?

3 A. No, I have no personal knowledge.

4 Q. And you have no personal knowledge as to when they
5 arrived in 2010 or 2011. Correct?

6 A. No, I don't.

7 Q. And you have no personal knowledge as to what time
8 the workers left in 2008?

9 A. 2008? No.

10 Q. And you have no personal knowledge as to when workers
11 departed in 2009, 2010, or 2011. Correct?

12 A. Correct.

13 Q. Now, you testified that you ate at the restaurant
14 frequently. Correct?

15 A. Yes.

16 Q. And when you ate at the restaurant, you sat in the
17 dining room. Right?

18 A. Not necessarily. Sometimes Luigi and I would sit at
19 the bar.

20 Q. So you often ate at the dining room or you ate at the
21 bar. Correct?

22 A. Correct.

23 Q. You did not eat in the kitchen. Correct?

24 A. No.

25 Q. There was a back door to the restaurant. Correct?

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 A. Yes.

2 Q. And that back door left through the kitchen.

3 Correct?

4 A. Correct.

5 Q. So if you were eating at the bar or the dining room
6 and someone went out the back door, you would not have
7 seen them. Correct?

8 A. Correct.

9 Q. Now let's talk about your role in Mr. Quarta's
10 business from 2007 and prior.

11 Your role was to pay bills. Correct?

12 A. Correct.

13 Q. And you made payments?

14 A. Yes.

15 Q. And you wrote checks?

16 A. Yes.

17 Q. And you reviewed mail?

18 A. Yes.

19 Q. Your job was not to supervise the kitchen workers.
20 Correct?

21 A. Certainly not.

22 Q. And your job was not to write down the hours that the
23 kitchen workers work. Correct?

24 A. Correct.

25 Q. And you didn't write down the hours that Mr. Quarta's

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 kitchen workers worked. Correct?

2 A. No. Correct.

3 Q. And your job was not to make sure that Mr. Quarta's
4 employees arrived at work at a certain time. Correct?

5 A. Correct.

6 Q. Or left at a certain time?

7 A. Correct.

8 Q. And you didn't decide how much workers were paid.
9 Correct?

10 A. Correct.

11 Q. And you never made any records of cash payments to
12 Mr. Quarta's employees. Did you?

13 A. No.

14 Q. And you never saw records of cash payments to
15 Mr. Quarta's employees?

16 A. No.

17 Q. Now, you testified that you believe that Mr. Quarta
18 didn't let people into his restaurant after 8 pm.

19 Correct?

20 A. He would let them in for drinks, but not seat them
21 for dinner.

22 Q. So Mr. Quarta would let people into the restaurant to
23 sit at the bar?

24 A. Yes.

25 Q. After 8 pm?

Gluszak - for the Defense - Cross/Ms. Goldstein

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1 A. Yes.

2 MS. GOLDSTEIN: I have nothing further, your
3 Honor.

4 THE COURT: Let me just ask a question, Mr.
5 Gluszak.

6 When you say the people came in to work in the
7 morning, starting at 11, right?

8 THE WITNESS: Right.

9 THE COURT: What was that based upon? Were you
10 sitting in the restaurant eating? How do you know?

11 THE WITNESS: Your Honor, what I would do is, my
12 office was next door.

13 A lot of times I would be the first one there,
14 because I had a key and the best time for me to do his
15 billing would be early in the day. I couldn't do it when
16 the restaurant was open because I would spread out on the
17 bar.

18 So I would open up the restaurant and then I
19 would hear them start coming in, 11 o'clock, 11:30. And I
20 would see the progression of the employees as they
21 arrived.

22 THE COURT: Okay.

23 Any redirect?

24 MR. NARDO: Yes, your Honor.

25

Gluszak - for the Defense - Redirect/Mr. Nardo

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1 REDIRECT EXAMINATION

2 BY MR. NARDO:

3 Q. How often per week or per month would you do the
4 billing at Luigi Quarta's restaurant?

5 A. Probably at least four times a week, because we had
6 different vendors getting paid at different times of the
7 week, different times of the month.

8 Q. When you went there to do the billing, how long would
9 you spend at the restaurant for that purpose, for the
10 billing?

11 A. It could range anywhere from an hour to two hours.

12 Q. And then you would often eat there at the restaurant.
13 Correct?

14 A. I ate lunch there almost every day.

15 MS. GOLDSTEIN: Objection. Asked and answered.

16 A. Yes.

17 THE COURT: Overruled.

18 A. Yes. I ate lunch almost every day.

19 BY MR. NARDO:

20 Q. And did you eat dinner there?

21 A. Yes, sir.

22 Q. How often?

23 A. Probably at least three times a week.

24 Q. At some point you and Mr. Quarta had a falling out?

25 A. Yes, we did.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. And so he has a judgment against you for \$500,000?

2 A. Yes, he does.

3 Q. So it's fair to say you're upset with Mr. Quarta?

4 A. Quite.

5 Q. So you're not here testifying as a friend of Luigi
6 Quarta. Is that right?

7 A. Absolutely not.

8 MR. NARDO: I have nothing further.

9 THE COURT: Anything further?

10 MS. GOLDSTEIN: No, your Honor.

11 THE COURT: Thank you. You can step down.

12 (The witness was excused.)

13 THE COURT: Now we're back to the plaintiff's
14 case.

15 **EVIDENCE FOR PLAINTIFF**

17 **ZORAYDA VASQUEZ**

18 called by the plaintiff, having been previously
19 duly sworn/affirmed, continued testifying as
20 follows:

21

22 **DIRECT EXAMINATION (Continued)**

23 BY MR. HENNEFELD:

24 Q. We were discussing Plaintiff's Exhibit 5.

25 MR. HENNEFELD: And, your Honor, just for a

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 point to clarify at this point, that when the exhibit was
2 admitted, Plaintiffs Exhibit 5 is a color copy of the time
3 records that were produced by the defendants, which will
4 be relevant here.

5 MR. NARDO: I missed it. It's a what copy?

6 MR. HENNEFELD: It's a color copy.

7 MR. NARDO: Oh.

8 BY MR. HENNEFELD:

9 Q. Miss Vasquez, looking at the time records in
10 Exhibit 5. What year are they from?

11 A. 2008.

12 Q. Did the daily time records in Exhibit 5 include all
13 of the restaurant's employees?

14 A. No.

15 Q. Which types of employees are included in these time
16 records?

17 A. Kitchen employees.

18 Q. Which types of employees are not included in these
19 time records?

20 A. The chef and the busboy.

21 Q. Did the employer ever produce any daily time records
22 for the chef and the busboy?

23 A. No.

24 Q. Now let's look at Page 2 of Exhibit 5, Miss Vasquez.
25 If you can, look at the screen behind you.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 What record does -- what period does the record
2 on this page cover?

3 A. Week ending November 15, 2008.

4 Q. And which employees are covered by this record?

5 A. Jeffrey Chavez and Juan Carlos Chevez.

6 Q. How many work days does this page show for these
7 employees for this work week?

8 A. It shows five days.

9 Q. What does this record show for the starting time each
10 morning?

11 A. Shows 11 am.

12 Q. What does this record show for the break time each
13 day for these employees?

14 A. 2:30 pm.

15 Q. What ending time is shown for the break time for
16 these employees?

17 A. 5 pm.

18 Q. And what is the total hours worked for the week as
19 that's shown on these records?

20 A. 40 regular hours.

21 Q. Did you make any observations about the handwriting
22 on this page?

23 A. Yes.

24 Q. What did you observe about the handwriting on this
25 page?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. That the work ending date is in pen, and the
2 start/stop, start/finish hours, all this information here
3 is all written in pencil.

4 Q. And why do you say that?

5 A. Because you could tell by the color.

6 Q. What about the color of the writing that you're
7 highlighting right now?

8 A. This is written in pencil -- in pen because the week
9 is written in pen, blue ink. And this other information
10 here, the hours, is written in pencil.

11 MR. NARDO: Objection, judge, to this line of
12 testimony.

13 I don't believe she has demonstrated any
14 qualifications to conjecture about this writing and what
15 it is.

16 THE COURT: I have a color copy here.

17 MR. HENNEFELD: Yes, sir.

18 THE COURT: So I can see for myself. I don't
19 really need her assistance on that.

20 MR. HENNEFELD: Okay. Thank you, your Honor.

21 BY MR. HENNEFELD:

22 Q. Miss Vasquez, we are now looking at -- on the screen
23 we have Page 1 of Exhibit 5.

24 What period does this Page 1 cover?

25 A. It covers November 8, 2008.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. Which employees?

2 A. Jeffrey Chavez and Juan Carlos Chevez.

3 Q. The same employees we saw on page 2 that we just
4 looked at?

5 A. Yes.

6 Q. In your review of Exhibit 5, did you compare this
7 page, page 1, with page 2 that we just looked at?

8 A. Yes.

9 Q. I'm showing you now on the screen, page 2 that we
10 looked at first is to the left side of the screen and
11 page 1, that we just looked at, is on the right side of
12 the screen.

13 A. Yes.

14 Q. Did you make any observations in comparing these
15 pages?

16 A. Yes.

17 Q. What did you observe in comparing these pages?

18 A. That page 1 is a photocopy of page 2.

19 Q. And why do you say that?

20 A. I could tell because of the coloring.

21 Page 1, you could tell that it is darker than
22 page 2, the original. You could tell by the coloring.
23 This is darker in color because this is a copy. And this
24 one is like a greyish. The pencil is, like, lighter, like
25 a light gray. And the work ended is in pen, in blue pen.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 So this information is the same, page 1 is the
2 same information as page 2.

3 Q. Just to clarify the record. When you said this one
4 is darker and looks like a copy, you were talking about
5 page 1 on the record. Correct?

6 A. Yes. Page 1 is darker than page 2.

7 Q. And did you observe any similarities between these
8 pages?

9 A. Yes.

10 Q. What similarities did you observe?

11 A. You have the same exact information. The same
12 information, the same handwriting. You could tell that
13 page 1 is a photocopy of page 2, which is the original.

14 Q. Can you identify any particular writing that looks
15 the same to you.

16 A. Yes. You could tell by the arrow.

17 Look at the arrow on Wednesday, where it says
18 all. See how it's the same, it's curved the same. And
19 you can also tell by 40 regular hours. It's the same
20 handwriting.

21 Q. Thank you.

22 A. The same handwriting. Everything is the same. Just
23 a photocopy. Page 1 is a photocopy of page 2.

24 Q. All right. Now showing you on the screen page 10 of
25 Exhibit 5. And what employees are covered by this record?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. Jeffrey Chavez and Juan Carlos Chevez.

2 Q. The same employees in the other record we looked at?

3 A. Yes.

4 Q. What period is covered?

5 A. Week ending January 1, 2008.

6 Q. And in your review of these records, have you
7 compared this page 10 with page 2 that we looked at first?

8 A. Yes.

9 Q. Showing you on the screen page 2 on the left and
10 page 10 on the right. What did you observe in comparing
11 these pages?

12 A. Page 10 is a photocopy of page 2.

13 Q. And in your review of these records, did you observe
14 any other pages that also appeared to be photocopies of
15 page 2?

16 A. Yes.

17 Q. Can you please briefly look through Pages 10 through
18 52 of Exhibit 5.

19 MR. NARDO: Objection, judge. Do we have to go
20 through all these pages?

21 THE COURT: No, we don't have to do this.

22 I have the exhibits. I can look through the
23 pages and see how many are the same. You don't have to
24 have her do that. I can see that they are photocopies.
25 That is enough.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 BY MR. HENNEFELD:

2 Q. Miss Vasquez, going back to page 10. You testified
3 that the period covered by page 10 is January, the week
4 ending January 12, 2008?

5 A. Yes.

6 Q. Going back to page 2, we see the week ending date
7 there is November 15, 2008.

8 So with respect to page 10, that is dated from
9 January 2008, when was that record actually filled out?

10 A. I don't know. But it wasn't January 12, 2008.

11 Q. And how do you know that?

12 A. Because the original was prepared -- if you look at
13 page 2, this is dated November 15, 2008, this is the
14 original, original handwriting.

15 So what happened here was that they made copies.
16 The original is dated November 15, 2008, and they made
17 copies and they went back to January 2008.

18 THE COURT: Was there an objection or no?

19 MR. NARDO: Well, yes. There was an objection
20 to when they were prepared.

21 I don't see how she can know when they were
22 prepared, judge.

23 THE COURT: I think again, she is just
24 testifying based upon when the one with the original ink
25 was on it.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Correct?

2 THE WITNESS: Right.

3 THE COURT: I want to emphasize again, she is
4 not an expert. These are things that, if you want to put
5 in a letter after the trial that lists for me the pages --
6 this is just based on argument and I don't really need to
7 have her go through these.

8 If you want to do something after the trial,
9 provide me with a list of every one you think are
10 identical in a letter to me, post findings of fact. Okay?

11 I think, given what's already been said
12 regarding this, what is stipulated, you don't have to go
13 through them page by page.

14 MR. HENNEFELD: Understood, your Honor. That is
15 all we had on this exhibit.

16 THE COURT: Okay.

17 MR. HENNEFELD: Thank you.

18 BY MR. HENNEFELD:

19 Q. Miss Vasquez, could you please look at Plaintiff's
20 Exhibit 6, the subsequent exhibit in the binder.

21 MR. HENNEFELD: And this exhibit has been
22 admitted?

23 THE COURT: Yes.

24 BY MR. HENNEFELD:

25 Q. Miss Vasquez, have you previously reviewed this

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 document?

2 A. Yes.

3 Q. And were you present in the courtroom when
4 Alex Torres testified about this document?

5 A. Yes.

6 Q. Okay. I also have this document up on the screen.

7 You can feel free to look at it on paper there. Whichever
8 is easier.

9 Miss Vasquez, we are looking at page 2 of
10 Exhibit 6 here. This has a date of August 2008 at the
11 top.

12 Do you see the column on the far right side of
13 the page?

14 A. Yes.

15 Q. From your review of this document, what are the
16 computations in that column?

17 A. It shows an hourly rate and it shows 40 hours and it
18 shows overtime -- it shows four hours overtime and it
19 shows that four hours were computed at regular time and
20 overtime was computed at time and a half.

21 Q. During the course of your investigation, did the
22 employer ever tell you that they paid employees an hourly
23 rate, with time and a half for overtime?

24 A. No.

25 Q. During the course of your investigation, did the

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 defendant -- did the employer ever show you any other
2 documents that had hourly rate and overtime computations?

3 A. No.

4 Q. Now, according to this document, page 2 of Exhibit 6,
5 based on the number in the far right column, how many
6 hours per week did these employees work in August of 2008?

7 A. It shows 44 hours.

8 Q. And did you compare that number, 44 hours, with the
9 number of hours shown on the daily time records that we
10 looked at in Exhibit 5?

11 A. Yes.

12 Q. Were they consistent with each other?

13 A. No.

14 Q. I'm sorry. I'm shifting gears just briefly here.

15 Miss Vasquez, are you aware that this court
16 issued a temporary restraining order against the
17 defendants on Friday?

18 A. Yes.

19 Q. And was a copy of that order served on Mr. Quarta on
20 Friday afternoon?

21 A. Yes.

22 Q. And could you please look at Exhibit 2 in the binder,
23 Plaintiff's Exhibit 2.

24 Do you recognize the documents in Plaintiff's
25 Exhibit 2.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. Yes.

2 Q. What are they?

3 A. Payroll records from Luigi Quarta Restaurant.

4 Q. And are these documents true and accurate copies of
5 payroll records from Mr. Quarta's business?

6 A. Yes.

7 MR. NARDO: Objection.

8 THE COURT: What is the objection?

9 MR. NARDO: She can testify that she received
10 them, but how can she know if it's a true and accurate
11 copy from his business? She's not running the business.

12 THE COURT: Okay.

13 You received these from Mr. Quarta?

14 THE WITNESS: Yes.

15 THE COURT: Okay.

16 MR. HENNEFELD: We move to admit Exhibit 2.

17 THE COURT: Any objection?

18 MR. NARDO: Yes. The same objection, judge, as
19 to relevance.

20 We're here for overtime. We're here for whether
21 or not they were paid properly. This exhibit just shows
22 some of the payroll but doesn't answer the questions about
23 overtime. I don't think hours are even indicated --
24 withdrawn. I take that back.

25 I don't see how this is relevant as opposed to

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

1 testimony of the employees and Mr. Gluszak as to when the
2 employees worked.

3 THE COURT: Mr. Hennefeld?

4 MR. HENNEFELD: Your Honor, as we have discussed
5 before, the payroll records are relevant certainly to the
6 relevance of the recordkeeping violation and the issue
7 that the employer did not accurately record the wages paid
8 to employees.

9 THE COURT: Okay. I'm going to admit them. At
10 a minimum they are relevant on the issue of the
11 recordkeeping violation, for sure. They're proven to be
12 inaccurate.

13 So I will admit Plaintiff's Exhibit 2, but we
14 don't need to go through it.

15 MR. HENNEFELD: Understood. I just have a few
16 brief questions about the exhibit.

17 THE COURT: Very brief.

18 MR. HENNEFELD: Yes, your Honor.

19 | (Plaintiff's Exhibit 2 in evidence.)

20 BY MR. HENNEFELD:

21 Q. Miss Vasquez, do the payroll record exhibits include
22 all the employees?

23 A. No.

24 Q. Which employees are included in these payroll
25 records?

Dominick M. Tursi, CM, CSR
Official US District Court Reporter

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. The chef and the busboy.

2 Q. Which types of employees are not included in these
3 payroll records?

4 A. The cooks.

5 Q. Are there any other employees -- types of employees
6 that are not?

7 A. The kitchen employees. The dishwashers. The salad
8 man, and the -- the salad man, the dishwasher, and the
9 cook.

10 Q. And for the employees who are included in these
11 payroll records, are the payroll records accurate?

12 A. No.

13 Q. Why not?

14 A. Because it doesn't show all the wages that they
15 received. And the employer -- it only shows that they
16 worked 40 hours.

17 Q. And is that accurate?

18 A. No.

19 Q. Miss Vasquez, please turn to Plaintiff's Exhibit 9.
20 What is Plaintiff's Exhibit 9?

21 A. It is a back wage computation summary sheet from
22 May 25, 2006, to March 24, 2012.

23 Q. Does Exhibit 9 consist of all your computations for
24 this trial?

25 A. Yes.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. And page 1 is the summary sheet for your
2 computations?

3 A. Yes.

4 Q. What is the total amount of back pay that you
5 computed?

6 A. \$137,206.76.

7 Q. For how many employees?

8 A. 12 employees.

9 Q. Miss Vasquez, just to clarify. One of the employee
10 last names listed here is LNU. What does that mean?

11 A. *Last Name Unknown.*

12 Q. And you stated that the top of the page shows the
13 summary of back wage computations is May 25, 2006, to
14 March 24, 2012. Correct?

15 A. Yes.

16 Q. Why did you compute all the way up through March of
17 this year?

18 A. Because the restaurant Luigi Q is still in violation.
19 He still hasn't come into compliance, so we had to compute
20 up to the present, which is March 24, 2012.

21 Q. For these computations, what sources of information
22 did you use for the employees' hours worked?

23 A. For the employees that was working was based on
24 testimony, expected testimony from the employees.

25 Q. And does that testimony include by deposition as

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 well?

2 A. Yes.

3 Q. What about for employees who did not testify and were
4 not expected to testify? What information did you use for
5 their hours worked?

6 A. For the hours worked, it was based on employees'
7 testimony and also it was based on documentation from
8 interrogatory responses from the employer.

9 I'm sorry. I'm sorry. Let me correct that.

10 Can you ask me that again?

11 Q. Sure. The question was, for employees who did not
12 testify, what information did you use for their hours
13 worked?

14 A. For the hours worked, it was based on employees'
15 testimony.

16 Q. Now, how did you use the expected testimony of some
17 employees for the hours worked of other employees who
18 weren't testifying?

19 A. Well, it was based on their occupation. So
20 basically, if the employee was a dishwasher, I used based
21 on their occupation.

22 Q. For your computation, for the employees who have
23 testified, what information did you use for those
24 employees' pay?

25 A. It was based on the testimony.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. Can you please turn to Plaintiff's Exhibit 10A. We
2 will come back to your computations, but we're just going
3 to look at this briefly. This document has been admitted.
4 For your computations -- withdraw that.

5 What is Exhibit 10A?

6 A. These are interrogatory responses by the employer.

7 Q. And for your computations for the employees who have
8 not testified, did you use Exhibit 10A?

9 A. For the employees that did not testify? Yes.

10 Q. And how did you, what information did you use in
11 Exhibit 10A for the employees who have not testified?

12 A. Can you repeat that again?

13 Q. Sure. How did you use the information in Exhibit 10A
14 for the employees who have not testified?

15 A. Well, the responses for them from the interrogatory
16 shows what they got paid. So I used what information that
17 was here for the people that did not testify.

18 Q. And you see there is also information about dates of
19 employment, in Exhibit 10A?

20 A. Yes.

21 Q. Did you also use that information for employees who
22 have not testified?

23 A. Yes.

24 Q. Now, we talked about the employer's records in this
25 case. Why didn't you base your computations only on the

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 employer's records?

2 A. Because they were not accurate. They were false
3 records.

4 Q. Now, are your computations, that is -- we are done
5 with Exhibit 10A.

6 Are your computations in Exhibit 9 precise to
7 the penny?

8 A. No.

9 Q. Why not?

10 A. Because I had to use an average because I didn't have
11 accurate records of the hours that these employees worked.
12 So I had to use an average based on the information from
13 the testimony.

14 Q. Okay. Let's go back to Exhibit 9 and to page 2 of
15 Exhibit 9. I want to just briefly talk through the
16 columns on your spreadsheet here.

17 On page 2 there, it says computations for Jose
18 Anibal Acosta. Correct?

19 A. Yes.

20 Q. What information generally did you use for these
21 computations?

22 A. Can you repeat that?

23 Q. What information did you use for Mr. Acosta's
24 computations?

25 A. It was based on his testimony.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 Q. The first two columns on the left side of the page
2 are Start and End period dates. Correct?

3 A. Yes.

4 Q. And then the next column, the third column from the
5 left, is *Total Weeks*?

6 A. Right.

7 Q. What is that column?

8 A. *Total Weeks* is from the start and end date. From
9 10/06/09 through 3/24/12, that's 129 weeks. So those are
10 total weeks that the employee worked.

11 Q. And is that just number of calendar weeks?

12 A. Calendar weeks, yes.

13 Q. The next column to the right is *Weeks Excluded*. What
14 is that column?

15 A. Those are weeks that were excluded because the
16 employee testified that the restaurant was closed one week
17 in August, so I excluded two weeks for that period.

18 Q. You excluded one week for each August?

19 A. Yes.

20 Q. Did you do that throughout your computations?

21 A. Yes.

22 Q. And the next column over is *Total Weeks Worked*. What
23 is that column?

24 A. That is total weeks minus the weeks excluded.

25 Q. And the next column over is *Weekly Hours Worked*.

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 How did you determine the number of weekly hours
2 worked?

3 A. Well, I took the -- from the expected testimony, I
4 took the starting time and I took when they had a break at
5 3 pm. They started at 10:30 am and then they took a break
6 at 3 pm. They went back to work at 4:30 pm. And then I
7 took -- added up the hours -- the time that they left,
8 added up the hours and I came up with roughly 57-1/2
9 weeks.

10 Q. 57-1/2 hours?

11 A. I'm sorry. Yes, 57-1/2 hours.

12 Q. And do you recall hearing testimony that workers
13 didn't leave at the exact same time each night?

14 A. Yes.

15 Q. Do you also recall testimony, employees describing a
16 range of times that they left?

17 A. Yes.

18 Q. And so how did you treat those ranges of times for
19 determining hours worked?

20 A. So if, for example, an employee says that they left
21 between 10 pm and 11 pm, so what I did, I based it on half
22 an hour. Again, it's based on half an hour, so I will
23 compute 10:30. I used an average.

24 Q. Did you use that methodology throughout your
25 computations?

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 A. Yes.

2 Q. And with respect to breaks, did you give credit for
3 the full hour and a half break for every weekday
4 throughout your computations?

5 A. Yes.

6 Q. Do you recall hearing testimony from employees that
7 sometimes they were not able to take a full hour and a
8 half break?

9 A. Yes.

10 Q. So why did you give credit for the full hour and a
11 half break?

12 A. I gave them the credit anyway. I want to give them
13 the benefit of the doubt, so I gave them credit for that,
14 also.

15 Q. The next column over is *Weekly Gross Pay*. I think
16 that is self-explanatory for Mr. Acosta.

17 What is the weekly gross pay based on?

18 A. It was based on his testimony.

19 Q. And do you see, in the bottom of the two lines for
20 Mr. Acosta's computations, the weekly gross pay is zero.
21 Why is that?

22 A. That's because the employee said that he didn't get
23 paid for the first week that he worked there; that it was
24 put in deposit.

25 Q. The next column over after *Weekly Gross Pay* is

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 *Reconstructed Regular Hourly Rate.*

2 What is that column?

3 A. That is weekly hours worked divided by weekly -- I'm
4 sorry -- weekly gross pay divided by weekly hours worked.
5 We get an hourly rate of 6.96.

6 Q. And the next column over is *Hourly Minimum Wage*.

7 What is that column?

8 A. Well, if you take the minimum wage. Right now it is
9 \$7.25. So I took the minimum wage, 7.25, minus the 6.96
10 reconstructed hourly rate. It gave me a discrepancy of 29
11 cents.

12 Q. And the next column over is *Weekly Minimum Wage
Deficiency*.

14 What is that column?

15 A. That's the hourly minimum wage times the weekly hours
16 worked.

17 Q. Just to clarify it. The hourly minimum wage
18 deficiency times weekly hours worked?

19 A. Yes.

20 Q. And the next column over, the *Weekly Overtime
Deficiency*, what is that column?

22 A. That is the overtime deficiency. So it is 7.25 times
23 .5 times the weekly hours worked equals 63.44.

24 Actually, let me rephrase that. I'm sorry.

25 It is the minimum wage, 7.25, times .5, times

Vasquez - for the Plaintiff - Direct/Mr. Hennefeld

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1 the overtime hours worked. So in this case, is 17 hours
2 and a half.

3 Q. And you get that from weekly hours worked of 57-1/2,
4 minus 40, equals 17-1/2 overtime hours?

5 A. Yes.

6 Q. And you used half of 7.25 as the rate for that
7 overtime computation.

8 Why are you using half of 7.25 rather than half
9 of 6.96, which was the reconstructed hourly rate?

10 A. Because when we pulled it up to the minimum wage, we
11 brought all hours worked at 7.25, which is minimum wage.

12 So in this case, the reconstructed -- the
13 deficiency for all hours worked, so now all that
14 deficiency is only half time of minimum wage.

15 Q. And the next column over, *Total Minimum Wage*
16 *Deficiency*, what is that column?

17 A. That is weekly minimum wage deficiency times total
18 weeks worked.

19 Q. And the next column over, *Total Overtime Deficiency*,
20 what is that column?

21 A. That's total overtime deficiency times total weeks
22 worked.

23 Q. And the final column to the right, *Amount Due*
24 *Employee*, what is that column?

25 A. If you add up the total minimum wage deficiency and

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 the total overtime deficiency, it equals amount owed
2 employee. The two together.

3 Q. And the number in bold on this page for Mr. Acosta is
4 \$6,680.

5 Is that the total owed for that employee?

6 A. Yes.

7 Q. And the methodology that you just described for the
8 columns on page 2, did you use these same methods
9 throughout your computations?

10 A. Yes.

11 MR. HENNEFELD: Plaintiff moves to admit Exhibit
12 9.

13 THE COURT: Any objection?

14 MR. NARDO: No objection, judge.

15 THE COURT: Plaintiff's Exhibit 9 is admitted.

16 (Plaintiff's Exhibit 9 in evidence.)

17 MR. HENNEFELD: One moment, your Honor.

18 Nothing further, your Honor.

19 THE COURT: Cross-examination?

20

21 CROSS-EXAMINATION

22 BY MR. NARDO:

23 Q. Good afternoon, Miss Vasquez.

24 A. Good afternoon, Mr. Nardo.

25 Q. Is an employee required to cooperate with the United

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 States Department of Labor investigation?

2 A. Is it mandatory? I mean, if it's required?

3 Q. Well, when you go to an employer's workplace, is an
4 employee required to speak with you?

5 A. I don't think it is required, no.

6 Q. And when you went to Luigi Q's workplace, you were
7 doing that secretly. Is that right?

8 A. Secretly from?

9 Q. From Luigi Q and from the management.

10 A. Well, yes.

11 Q. And you didn't want Luigi Q to know that you were
12 talking to his employees. Correct?

13 MR. HENNEFELD: Objection. Relevance.

14 THE COURT: I will allow it.

15 A. Well, it didn't matter whether he knew or not, I
16 mean, if it came from the employees.

17 BY MR. NARDO:

18 Q. Did you ever walk through the front door and say to
19 Mr. Quarta that you wanted to speak to his employees?

20 A. No.

21 Q. You went in through the back door to speak to the
22 employees directly. Correct?

23 A. Not the back door. In the parking lot, the back of
24 the restaurant.

25 Q. The restaurant has a back entrance. Right?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. You went to that entrance and spoke to the employees
3 directly?

4 A. Yes.

5 Q. Did you tell the employees not to tell Luigi Q that
6 the employees were speaking with you?

7 A. Can you rephrase that? Can you rephrase that?

8 Q. Sure. Did you tell any of Luigi -- withdrawn.

9 Did you tell any of the employees of Luigi Q
10 that -- not to say to Luigi that they were speaking to
11 you?

12 A. No.

13 MR. HENNEFELD: Objection. Relevance.

14 THE COURT: Overruled.

15 BY MR. NARDO:

16 Q. Did you tell any of the employees to tell Luigi Q
17 that the Department of Labor stopped by?

18 A. No.

19 Q. And you're familiar with Luigi Q's signature? Luigi
20 Quarta's signature, I should say.

21 A. No.

22 Q. And is it true that you never went to the secret
23 surveillance of Luigi Q's restaurant on a Saturday?

24 A. Right.

25 Q. So to the extent you're computing hours for

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 Saturdays, none of that is reliant upon your personal
2 observations. Correct?

3 A. It is based on information I got from the employees.

4 Q. Right. And that is employee interviews?

5 A. Yes.

6 Q. Many of those interviews were in the parking lot or
7 the back of Luigi Q's restaurant. Correct?

8 A. Yes.

9 Q. And you took notes of these interviews?

10 A. Yes.

11 Q. And some of them were signed by the employees?

12 A. Some were signed, yes.

13 Q. Did you explain to the employees what it meant to be
14 paid overtime?

15 A. If I explained to the employees?

16 Q. Yes.

17 A. Well, when I interviewed employees, I basically asked
18 them questions about the starting time, if they took any
19 breaks, the ending time. I got all that information. And
20 I also asked them about their pay.

21 Q. In the employees' statements, did they sign
22 statements that said that they weren't paid overtime?

23 A. Yes, they did sign statements.

24 Q. So how did the employees know that they weren't paid
25 overtime?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Because they gave me their schedules, so when I added
2 up the hours, it was more than 40 hours. So at that
3 moment I asked them, you know, if you are working more
4 than 40 hours, do you get paid overtime? And when the
5 employee would answer, no I don't get paid overtime.

6 Q. And did you tell them to discuss that with
7 Mr. Quarta?

8 A. No.

9 Q. Did you ever personally go through the front door of
10 Luigi's restaurant to see if he had time sheets or time
11 cards or a time clock?

12 A. I met with Mr. Luigi at the initial conference. But
13 no, I didn't request any time records at that moment.

14 Q. Did you ever go to the restaurant, itself, to see if
15 he had a time clock?

16 A. No.

17 Q. Did you ever go to the restaurant, itself, to see if
18 he had time cards?

19 A. No. I requested them. But I never went there, no.

20 Q. Do you remember Juan Carlos Cantos Chevez signing a
21 statement that says Pastor is in charge of the kitchen?

22 A. Yes.

23 Q. You do recall that?

24 A. On his testimony?

25 Q. No. Do you recall preparing a statement, an employee

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 personal interview statement, for Juan Carlos Cantos
2 Chavez, where he'd signed a statement and part of the
3 statement said Pastor is in charge of the kitchen?

4 A. Well, if it's there then I must have written it.

5 Q. Okay. Well, let's just make sure.

6 A. Yes.

7 Q. Let's take a look at Defendant's N. And you can look
8 at, as far as I know, the first page is in English, the
9 second page is in Spanish.

10 Do you see where it says Pastor is in charge of
11 the kitchen?

12 A. Okay. I see it.

13 Q. You see it?

14 A. Yes.

15 Q. So did he tell that to you and then you wrote it in
16 the statement?

17 A. Yes.

18 Q. And then you presented the statement for him to sign?

19 A. Yes.

20 Q. Do you know what Mr. Zanbrano-Banegas did? I think
21 I'm getting that name wrong. Alexander Banegas-Zanbrano.

22 Do you know what he did for the restaurant?

23 A. Alexander Zanbrano?

24 Q. Yes.

25 A. Alexander Zanbrano is the busboy.

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 Q. So was he included on the payroll? You can look at
2 Exhibit 2.

3 A. Exhibit 2. Can I check it?

4 Q. Yes.

5 A. Okay.

6 Q. Do you see his name in that exhibit?

7 A. Yes.

8 Q. There is a comment there on Enrique. Do you know
9 his -- oh, I think his last name is unknown?

10 A. Um-hmm.

11 Q. You never spoke with him about his hours of work, did
12 you?

13 A. No.

14 Q. And you never spoke with him about his rate of pay?

15 A. No.

16 Q. So you had to estimate that for purposes of the
17 damage computations. Is that right?

18 A. It was based on chef. The chef is basically making
19 750, so we based it on that.

20 Q. That is what the prior chef made?

21 A. That is what Pastor made when he started, 750.

22 Q. Okay. The same thing with someone named Horacio?
23 You estimated his wages and hours. Correct?

24 A. Yes.

25 Q. The same thing with Jorge Gonzalez?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Jorge Gonzalez, I can't recall what his position was
2 there.

3 Q. But did you estimate his wages and hours?

4 A. Yes.

5 Q. And the estimate for Jose Anibal, you said it was
6 based on his testimony. What did you mean by his
7 testimony?

8 A. On his wages, you mean?

9 Q. Yes.

10 A. His wages was based on expected testimony.

11 Q. Expected testimony?

12 A. Yes.

13 Q. Okay. Do you recall at one point believing that the
14 employees were working 61 hours at Luigi Q's?

15 A. Yes.

16 Q. Did you later conclude that that was too high an
17 estimate for all the employees?

18 A. When you said later, what do you mean by that? Do
19 you mean when I met with the employer?

20 Q. Well, look at Plaintiff's Exhibit 9.

21 Did you conclude that 61 hours does not apply to
22 all the employees?

23 A. Yes.

24 Q. And previously the 61 hours was a conclusion you came
25 to based on the information you had at the time?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. And at some point you thought that 61 hours might be
3 too low of an estimate. Is that right?

4 A. Yes.

5 Q. But the current estimates you have in Exhibit 9 are
6 the most correct estimates that you have?

7 A. Yes. Because on these, on Exhibit 9 I gave him
8 breaks. I gave him breaks on the vacation.

9 So, you know, these people also said that they
10 took a longer break, so I didn't compute based on that.

11 I gave him a lot of breaks on the -- I gave him
12 a lot of breaks on the break, which they said that they
13 sometimes had to take a longer break, and I also gave him
14 the vacation time.

15 Q. The vacation time is not going to affect the hours
16 per week. Right?

17 A. No. But the total hours that they worked, sometimes
18 they left a little later; the dishwasher was required to
19 stay later. As far as they -- during their breaks, if
20 there were customers, they were required to stay working
21 during the breaks, longer hours.

22 Q. Were there times when the restaurant wasn't busy and
23 they would leave earlier?

24 A. No. They were not -- they couldn't leave earlier.

25 Q. And your original calculations didn't have a vacation

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 time. Correct?

2 A. Maybe not. I can't recall. Maybe not.

3 Q. You met a couple of times with Luigi Quarta. Is that
4 right?

5 A. Yes.

6 Q. He was never rude to you?

7 A. No.

8 Q. Never impolite?

9 A. No.

10 MR. HENNEFELD: Objection. Relevance.

11 THE COURT: Overruled.

12 BY MR. NARDO:

13 Q. And as part of your computation, did you ever
14 consider whether Mr. Alfaro Pastor was exempt from the
15 overtime requirements of the Fair Labor Standards Act?

16 A. During my meeting with Luigi Quarta. Is that what
17 you're referring to?

18 Q. No. At any point when you were making your
19 calculations, did you ever consider that Pastor might be
20 exempt?

21 A. No, he's not -- he's a nonexempt employee.

22 Q. Were there ever discussions about that?

23 MR. HENNEFELD: Objection with respect to any
24 attorney-client discussions.

25 THE COURT: Sustained.

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 Discussions with Mr. Quarta or who?

2 MR. NARDO: I will withdraw it, judge.

3 BY MR. NARDO:

4 Q. I would like you to look at Defendant's Exhibit B,
5 which I will get for you.

6 You have to prepare a case file for these cases.

7 Correct?

8 A. Yes.

9 Q. And this is a portion of that case file?

10 A. Can you repeat that?

11 Q. Is this a portion of your case file?

12 A. Yes.

13 Q. And this case file was maintained in the ordinary
14 course of business?

15 A. What is that?

16 Q. Did you have a duty to maintain this case file?

17 A. Yes.

18 Q. I would like to turn to the page that says Bates
19 stamped, at the bottom, SCA-50. Can you tell me what that
20 is?

21 A. These are our case diary entries.

22 Q. Are these entries you made into the case diary?

23 A. Yes.

24 Q. The first entry, it says, *Case registered for*
25 *complaint.* Right?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. Yes.

2 Q. Who made that complaint?

3 MR. HENNEFELD: Objection. Relevance.

4 THE COURT: Sustained.

5 BY MR. NARDO:

6 Q. How did this case come about?

7 MR. HENNEFELD: Objection.

8 THE COURT: Sustained.

9 The stipulation again raises the issue of
10 informant's privilege. I did allow questioning to the
11 extent that there may have been group meetings, which she
12 testified there were not. But I'll allow you to question
13 the witness regarding that.

14 But it is completely irrelevant who started the
15 case, so I'm going to sustain the privilege. It doesn't
16 relate to any issue that I have to consider.

17 MR. NARDO: If the employee's already testified,
18 judge, doesn't that become public?

19 THE COURT: I don't think that was testified.
20 They started the investigation. The employee said, yes, I
21 was the one who started the investigation.

22 MR. NARDO: No. I guess what I'm saying is, if
23 the employee who started the investigation has already
24 testified, is it still considered privileged?

25 THE COURT: I think so because it would disclose

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 who initiated the case, and I don't think there is any
2 need to know which one of them was the first one.

3 BY MR. NARDO:

4 Q. Okay. Can you turn to the next page, page 51.

5 Did you have to log the amount of time you spent
6 on the case, also?

7 A. Yes.

8 Q. And on these entries it says Total Hours Charged and
9 it will give a date?

10 A. Yes.

11 Q. So if we look at August 5, 2008, the entry says: *Met*
12 *with Luigi Quarta. Provided him with WH-56. Will meet*
13 *with his accountant and lawyer to review and will set up a*
14 *meeting.*

15 Do you see where it says that?

16 A. Yes.

17 Q. And did that occur on August 5, 2008?

18 A. I'm sorry.

19 Q. Did that occur on August 5 of 2008?

20 A. Yes.

21 Q. And then it says, *Total Hours Charged on*
22 *August 5, 2008: 4.*

23 Do you see where it says that?

24 A. Yes.

25 Q. So does that mean that that meeting was four hours?

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 A. No, not necessarily.

2 Q. What does the four hours represent, then?

3 A. Well, you know, I can't remember if the meeting was
4 four hours, but on our notes, that there are times when we
5 have to meet with their representative and then we have to
6 go back and sometimes we have to do other tasks on the
7 case. So not only did we meet with the employer, we might
8 have to go back and do other tasks.

9 Q. What is your normal workday with the Department of
10 Labor? How many hours a day?

11 MR. HENNEFELD: Objection. Relevance.

12 THE COURT: I don't really understand the
13 purpose of this line of questioning.

14 MR. NARDO: I just want to see if her time
15 entries are accurate for the amount of time she spent on
16 this case.

17 THE COURT: If they're inaccurate, what does
18 that mean? It doesn't mean anything about your client's
19 accuracy, right?

20 MR. NARDO: Well, if they can't keep accurate
21 records of their own time records, are they going to --

22 THE COURT: If the Department of Labor's records
23 are not accurate doesn't mean Quarta isn't going to have
24 to keep accurate records.

25 MR. NARDO: Well, they're the ones, judge, who

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1 would put together the estimates of the hours worked.

2 THE COURT: Well, her chart is at least in line
3 with what the employees report to her. I can do that
4 calculation myself, right? I can do the math. She has
5 all the exhibits attached to her chart. So I don't have
6 to rely upon her math, right?

7 MR. NARDO: I will leave that up to your Honor.

8 THE COURT: Yes. I can do the math by myself,
9 so I don't think we need to get into exploring how
10 accurate her own records are.

11 BY MR. NARDO:

12 Q. When is the last time you were at Luigi Q's
13 restaurant, Miss Vasquez?

14 A. Friday.

15 Q. Were you able to write a statement Friday and have
16 Mr. Anibal or the other employee, Jeffrey Cantos Chavez
17 [sic], sign a statement about what Luigi Quarta or the
18 chef allegedly told him?

19 A. You mean if I wrote it down for them to sign as to
20 what happened?

21 Q. Right.

22 A. No.

23 Q. You submitted a statement to the court --

24 A. Oh, you mean if I signed it?

25 I think that is a misunderstanding here. If I

Vasquez - for the Plaintiff - Cross/Mr. Nardo

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1 signed it?

2 Q. No. First I asked if they signed it.

3 A. Yes.

4 Q. They didn't sign a statement?

5 A. No, they didn't sign it.

6 Q. You submitted a statement stating that Mr. Cantos
7 Chevez said that Enrique said that Luigi Quarta said some
8 threatening statement.

9 A. Right.

10 Q. Did you try to get a statement directly from
11 Mr. Cantos Chevez?

12 MR. HENNEFELD: Objection. Vague.

13 A. From Juan Carlos?

14 THE COURT: Overruled.

15 BY MR. NARDO:

16 Q. Yes.

17 A. Juan Carlos?

18 Q. Yes.

19 A. Directly from him, personally?

20 Q. Yes.

21 A. It was over the phone.

22 Q. It was over the phone. Okay.

23 Well, I thought you said you were at the
24 restaurant Friday.

25 A. Oh, no. I went to serve the TRO on Friday to

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1 Luigi Quarta.

2 Q. And did you try to get -- on Thursday did you ever
3 try to get a statement from Mr. Acosta in writing, signed
4 by him?

5 A. In writing? No.

6 Q. Are there written guidelines about how you're
7 supposed to keep your case diaries?

8 MR. HENNEFELD: Objection. Relevance.

9 THE COURT: Same ruling. Sustained.

10 BY MR. NARDO:

11 Q. At some point you wrote that you observed a Hispanic
12 sweeping the back of the restaurant. Do you recall that?

13 A. Yes.

14 Q. Why did you write that?

15 A. Because I observed a Hispanic cleaning the back of
16 the restaurant.

17 Q. How can you tell the person was Hispanic?

18 A. Because I had already spoken with them in Spanish, so
19 I knew they were Hispanics.

20 Q. Do you know how many hours you spent on this case in
21 the investigation phase?

22 MR. HENNEFELD: Objection. Relevance.

23 THE COURT: I will let her answer.

24 Do you know?

25 THE WITNESS: On that particular day? Or doing

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1 surveillance?

2 BY MR. NARDO:

3 Q. No. For the entirety of your investigation. Do you
4 know how many, since we're keeping track of the hours, do
5 you know how many you spent on the case?

6 A. You mean since I started in 2008, how many hours so
7 far?

8 Q. Right.

9 A. To the present?

10 Q. Or until you stopped keeping track.

11 A. Oh, I don't know.

12 Q. Okay. Did you ever speak with Mr. Gluszak for your
13 investigation?

14 A. No, I never spoke with Mr. Gluszak.

15 Q. Did you ever ask Pastor if he supervised employees?

16 A. I might have.

17 MR. NARDO: I have nothing further, judge.

18 THE COURT: Any redirect?

19 MR. HENNEFELD: No, your Honor.

20 THE COURT: You can step down. Thank you.

21 (The witness was excused.)

22 THE COURT: Why don't we take our break for the
23 afternoon.

24 What do you have left to do?

25 MR. HENNEFELD: We have no further witnesses,

1 your Honor.

2 We have one minor exhibit matter, the
3 defendant's deposition, and then the matter of the
4 preliminary injunction and motion to amend, and that's it
5 for our case.

6 THE COURT: And then what do you intend to do in
7 your case?

8 MR. NARDO: Judge, we're going to rest our case,
9 also, except that we're going to put in deposition
10 testimony of Melvin Banegas, which is Exhibit G in our
11 book.

12 THE COURT: Any objection to that?

13 MR. HENNEFELD: No. Your Honor ruled on our one
14 objection to that.

15 THE COURT: I think I already admitted this,
16 actually, didn't I? Yes, that is already in. Good. It's
17 in.

18 You were going to show me there are certain
19 portions on it in reference to your client's deposition?

20 MR. NARDO: Yes, there very well might be,
21 judge.

22 THE COURT: Maybe can I review them during the
23 break?

24 MR. NARDO: Yes. I can tell you right now.

25 THE COURT: Give them to my deputy and just show

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1 me.

2 MR. NARDO: Judge, it's just one or two pages.

3 THE COURT: Okay.

4 MR. NARDO: On Luigi Quarta's deposition, it's
5 actually pages 11 through 13, and I think the objection
6 there is that it is just -- it concerns other employers,
7 judge.

8 THE COURT: So it is relevance?

9 MR. NARDO: Yes.

10 Page 37, they have an answer marked -- they just
11 have part of the answer marked. I would submit that if
12 you are going to mark the answer, you have to mark the
13 full answer.

14 THE COURT: I will take a look at it.

15 Let's take a 10-minute break. What we will do
16 then is, we'll address these remaining exhibit issues and
17 then I will give you a chance, if you want, to sum up.
18 You can sum up so we can be done today.

19 MR. HENNEFELD: And also, the preliminary
20 injunction motion and motion to amend issues.

21 THE COURT: Yes.

22 MR. NARDO: And the objection to the plaintiff's
23 portion of Melvin Banegas's testimony.

24 THE COURT: You have objections?

25 MR. NARDO: Yes, to their portion. We both have

1 portions of Melvin Banegas.

2 THE COURT: I thought I ruled on your objections
3 to their portion.

4 MR. NARDO: Right. Yes.

5 Very briefly. Page 41 to 43 concerns his
6 termination from Luigi Q's. I don't get that it's
7 relevant.

8 And page 47 concerns when customers, you know,
9 when customers come and go from the restaurant. And I
10 don't think that is relevant.

11 And there is a whole host of pages that have no
12 markings at all, which I assume can come out of -- or,
13 your Honor, can go in normally.

14 THE COURT: If I get anything not marked, you
15 are going to ignore it, right?

16 MR. HENNEFELD: Yes, your Honor. We've provided
17 that deposition in its entirety. For the court's
18 convenience, we have highlighted the portion we are
19 designating.

20 THE COURT: I'm only going to read the portions
21 that are highlighted.

22 MR. NARDO: Thank you, your Honor.

23 THE COURT: Let's take our break.

24 (Recess taken from 3:50 pm until 4:15 pm.)

25 THE COURT: I have reviewed the objections.

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1 Let's start with defendant's deposition.

2 Again, just to make sure, the plaintiff is
3 speaking to admit the highlighted portions of Mr. Quarta's
4 deposition. Correct?

5 MR. HENNEFELD: Yes.

6 THE COURT: There were objections on Page 11,
7 13, on relevance grounds, which I'm going to sustain.

8 It relates to other jobs that Mr. Quarta has had
9 in the restaurant business. I don't think they have any
10 relevance, so I'm going to sustain the objection. So I
11 will not consider pages 11 through 13.

12 Another objection by Mr. Nardo is on page 37. I
13 want to make sure I understood that line 3 is the only
14 line highlighted for the answer, and you want down to 12
15 to be included, line 12?

16 MR. NARDO: The full extent of that answer,
17 judge.

18 THE COURT: Yes. That is granted. So I will
19 consider page 37, the full answer, lines 3 through line
20 12.

21 So with those rulings, the highlighted portions
22 of Exhibit 12 as modified by the court's rulings is
23 admitted.

24 (Plaintiff's Exhibit 12 in evidence.)

25 THE COURT: Then on Exhibit 13, the objection

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1 was from page 41 to page 43.

2 I'm going to allow in page 41, line 8, to page
3 42, line 8, because that relates to his pay and describes
4 how he had to go back to get his last payment that he was
5 owed. His one week was withheld. So I think that is
6 relevant.

7 But I'm going to sustain the objection to the
8 rest of page 42, starting with line 9, to page 43, line 8,
9 because that just goes to why Mr. Quarta was screaming at
10 him. It doesn't have any relevance to any issues in the
11 case.

12 So I will sustain the objection and not consider
13 page 42, line 9, to page 43, line 8.

14 And page 47, I'm going to overrule that
15 objection because the question is peppered with when
16 clients started to arrive. The answers reference when he
17 arrived in conjunction with that. So in explaining when
18 customers begin to arrive, he explains when his breaks
19 were and when he started.

20 I'm going to overrule the objection because I
21 think, although the question might have been focused on
22 when the clients arrived, his answers certainly referenced
23 his arrival time, his break time, so they'd certainly be
24 relevant.

25 So the highlighted portions of Exhibit 13, as

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1 modified by the court's rulings, is admitted.

2 (Plaintiff's Exhibit 13 in evidence.)

3 THE COURT: Any other exhibits that the
4 Department of Labor is seeking to admit that I haven't
5 admitted?

6 MR. HENNEFELD: No, your Honor.

7 THE COURT: So you rest?

8 MR. NARDO: Can I just go over what is admitted,
9 judge?

10 THE COURT: Yes. You want to go over what
11 exhibits are admitted?

12 MR. NARDO: Yes.

13 THE COURT: Okay. This is what I have. Tell me
14 if I'm wrong.

15 Exhibit 1, Exhibit 8A, the portions of the
16 deposition transcript I indicated for Exhibit 12. And
17 Exhibit 13, Exhibit 6, Exhibit 7, Exhibit 7A, Exhibit 10,
18 10A, 11, 5, 2, 9, and then Defendant's Exhibit G.

19 MR. HENNEFELD: That's what we have, your Honor.

20 MR. NARDO: I'm sorry. I didn't hear the
21 defendant's exhibit.

22 THE COURT: G. Okay?

23 MR. NARDO: Okay.

24 THE COURT: So the Department of Labor rests,
25 then?

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1 MR. HENNEFELD: Yes, with the exception of the
2 preliminary injunction and motion to amend.
3

4 PLAINTIFF RESTS
5

6 THE COURT: Yes.
7

The defendants rest?

8 MR. NARDO: And move for a directed verdict.
9

THE COURT: Okay. That is denied.

10 MR. NARDO: Okay. We rest.
11

12 DEFENSE RESTS
13

14 THE COURT: Again, I will place the ruling on
15 the record that the standard for a directed verdict is
16 that the evidence is construed most favorably to the
17 plaintiff and all reasonable inferences drawn in
18 plaintiff's favor.

19 Certainly, if all of the Department of Labor's
20 witnesses are credited and all reasonable inferences drawn
21 in their favor, certainly there is sufficient evidence to
22 find in favor of the plaintiffs on the claim that they
23 have brought.

24 Based upon the hours that the witnesses
25 testified to that they're working, it would certainly be

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1 sufficient basis for that violation for both the minimum
2 wage and overtime laws as well the recordkeeping. And
3 there would be sufficient evidence, as well, on the issue
4 of willfulness.

5 And the defendants have rested?

6 MR. NARDO: Yes, your Honor.

7 THE COURT: So let's address this issue
8 regarding the desire to amend the claim of retaliation.

9 What is your position on that?

10 MR. HENNEFELD: Your Honor, we do seek to amend
11 to add the retaliation claim.

12 If I may first address the issue of the
13 preliminary injunction?

14 THE COURT: Sure.

15 MR. HENNEFELD: We renew our motion for a
16 preliminary injunction until such time as a permanent
17 injunction is adjudicated to enjoin the defendants from
18 retaliatory discharge or any other retaliatory or
19 discriminatory act in violation of Rule 15(a)(3) against
20 the two employees questioned or any other employees.

21 And the exhibits -- the evidence that's extended
22 that supports a preliminary injunction is certainly that
23 it's overlapping, it is the same as the evidence that
24 supports our motion to amend, to add a 15(a)(3) claim.
25 And the evidence has certainly shown the initial

1 retaliatory conduct by the defendants.

2 It's clear that those employees have no
3 misunderstanding of the threat that was being made against
4 them. And their testimony also showed that the threats
5 continued after the TR0 had been issued and the individual
6 defendant had been personally served with the TR0.

7 So it's clear that the defendant did not learn
8 his lesson from having received the TR0, and has
9 continued, on that Friday night and through the next day,
10 Saturday. So we don't believe that the defendant now
11 knows how to do right on this issue and we don't want to
12 take his word that everything is copacetic now on this.

13 There's need for a further continuing court
14 order on this issue to protect these workers. And, as
15 your Honor pointed out that, you know, with the
16 continuing -- the further injunction would simply be an
17 order essentially to obey the law, to obey the law of
18 15(a)(3), which is true and which is, you know, common and
19 appropriate.

20 And actually the action which we seek is
21 injunctive relief enjoining the employer to obey the law.
22 I mean, that's still important here, to have the court's
23 contempt power exerted over the defendant to further
24 protect the employees.

25 THE COURT: I wasn't suggesting a further

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1 injunction to obey the law didn't have any meaning. I
2 understand the contempt power of the court.

3 What I am going to is, in fact I'll hear from
4 Mr. Nardo on the issue before issuing an injunction, but
5 if you are going to amend, you are going to have to file
6 an amended complaint. He is going to get an opportunity
7 to answer that complaint and he is going to get an
8 opportunity to have discovery then as it relates to that.

9 Obviously, there was testimony regarding this
10 intermediary cook who is translating or conveying
11 directives, is alleged to be relaying directives to the
12 employees. So you have to have the discovery on that. If
13 you want to investigate that, take his deposition,
14 whatever you want to do on that, you would be entitled to
15 do that, and then be entitled to have the court reopen the
16 trial record and hear additional testimony on that claim.

17 That would be obviously, I think you would be
18 resting on the testimony that has already been elicited.

19 Correct?

20 MR. HENNEFELD: Yes, your Honor.

21 THE COURT: But I would have to reopen the trial
22 to allow him to either recall those two employees, if he
23 wishes to, give him the right to recall them, question
24 them further once he's done further investigation of this
25 claim, and then to put on any evidence that he wants to

1 put on.

2 All that would have to take place, which I think
3 certainly would be appropriate because, obviously, no
4 claim in terms of the amendment, the proposed amendment,
5 he brought it to my attention and immediately sought to
6 vindicate himself. So that is the procedure we'll have to
7 follow. Okay?

8 MR. HENNEFELD: Certainly, your Honor.

9 May we reserve right to submit a supplemental
10 briefing on the issue?

11 THE COURT: On whether you should be able to
12 amend? I don't need supplemental briefing on that claim.
13 I'm giving you the right to amend, so I don't need any
14 briefing on that, merely on the right to amend.

15 Are you asking for something else?

16 MR. HENNEFELD: No. We are seeking to amend, to
17 conform to the evidence.

18 THE COURT: I know. I understand that. You
19 keep saying that. I understand that. But I'm just
20 conveying to you, it is not that simple. You don't say,
21 We amend to conform to the evidence. Here is our amended
22 complaint. We rest. The case is over. We want you to
23 decide this. That is not how it's going to happen.

24 You've got a new claim, these facts just arose,
25 and he is entitled to discovery on it and he is entitled

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1 to a trial on that.

2 So it is not simply -- I'm just not going to
3 simply let you amend to conform to the pleadings and then
4 submit it for the court's determination. That is not what
5 is going to happen. I'll allow you to amend but all those
6 other things are going to happen first.

7 Do you understand that?

8 MR. HENNEFELD: Yes, your Honor.

9 MR. NARDO: Judge, may I be heard on that?

10 THE COURT: Yes.

11 MR. NARDO: Retaliation, antiretaliation, is in
12 the statute. It is the law. And that will continue to be
13 the law regardless of what your Honor does.

14 The TR0 granted by your Honor made sense to the
15 extent that these employees should not have been prevented
16 from testifying at trial, which is what your Honor was
17 seeking to avoid, the Department of Labor was seeking to
18 avoid, and which was never the intent of Mr. Quarta. And
19 these employees have shown up. They've testified.

20 So I submit to you, judge, that the issue is now
21 moot. They have testified, the TR0 is about to expire,
22 and if there is further -- if they think there is
23 retaliation, the employees themselves, or with private
24 counsel, or the United States government can file a
25 complaint in federal court stating that they've been

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1 retaliated against.

2 But to bootstrap that onto this complaint is
3 entirely unnecessary and just is burdening the record with
4 facts that are irrelevant and are moot since the employees
5 have now testified.

6 I would also submit to you, judge, that this
7 order -- I'm not sure when this order was available on
8 ECF, the conformed order. This order was never served on
9 my office. You would think that you would serve the
10 attorney who is representing the client with the order if
11 you are going to serve anybody, if it is necessary.

12 Giving an order to the client, who is running a
13 restaurant, who doesn't speak English as his first
14 language, I think that could be an ethical violation of
15 direct dealing because you're giving it to the client, not
16 the attorney. And I don't think that served any purpose
17 because you can't expect somebody who doesn't speak
18 English as a first language to understand the specifics of
19 a temporary restraining order.

20 So I submit to you that the fact that he was
21 served with a legal document with handwriting on it on
22 Saturday, or whenever he was served, means absolutely
23 nothing and was not the proper procedure to follow.

24 Now that the case is over, judge, if there is
25 any claim of retaliation, let that be filed in a separate

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1 lawsuit.

2 THE COURT: Why should they have to file it in a
3 separate lawsuit? It arises out of the same factual
4 circumstances that relate to this case.

5 As you know, in a normal discrimination case,
6 the retaliation claim is always tried -- I shouldn't say
7 always; in almost every instance is tried with the
8 underlying discrimination claim and there would be no
9 reason to make them file a separate action on this.

10 MR. NARDO: Well, I mean, the facts and
11 circumstances of the underlying claim were minimum wage
12 and overtime. The factual circumstances of the
13 retaliation claim are a completely different statute. And
14 if there were a discrimination claim that occurred, then
15 they would have to go to the EEOC and let it sit there for
16 180 days before bringing it into federal court. You can't
17 just automatically bootstrap it by saying there is
18 retaliation when there is an antiretaliation statute.

19 THE COURT: I know. But the Department of Labor
20 is entitled to seek -- and it's for the same reason
21 they're entitled to seek correction of private parties --
22 I think there are some cases out there that say private
23 parties cannot seek this type of injunctive relief, but
24 the statute specifically allows for the Department of
25 Labor to seek permanent injunctive relief for the

1 violations both to the recordkeeping provision as well as
2 the retaliation provision.

3 They're entitled to do that under the law. That
4 is what they're seeking to do here. It is not moot
5 because, to the extent that they wish to seek that, they
6 have a justifiable concern that the employees could be
7 fired as they are seeking to amend their complaint and
8 seek that additional relief.

9 So while they may have avoided any retaliatory
10 discharge for purposes of trial on these claims and for
11 purposes of the preliminary injunction motion, absent some
12 type of continuing injunctive relief the employees could
13 be subject to termination before they can seek their
14 permanent injunctive relief.

15 So it is not moot and they certainly have the
16 right to do it.

17 MR. NARDO: Well, the employees have testified,
18 and as far as we all know the employees are still working
19 there. So it is unclear to me what the retaliation is.
20 There has to be an adverse employment action for there to
21 be retaliation.

22 THE COURT: Well, the threats, themselves, could
23 be sufficient.

24 But in any event, their testimony was that they
25 were told, this is your last day, you are stopping as of

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1 Saturday. So in fact if their testimony is credited, they
2 were terminated. They were told don't come back to work.

3 The only thing that prevented that termination
4 from becoming effective was the fact that I issued an
5 order saying that they could not be terminated. But they
6 were told, according to their testimony, don't come back
7 on Monday.

8 So I consider that not only a threat of
9 termination, I consider that termination. They were
10 terminated, according to their testimony.

11 MR. NARDO: So the TRO expires today, correct?

12 THE COURT: Yes. My intention is to convert it
13 to a preliminary injunction today. And the preliminary
14 injunction will remain in effect until they have time to
15 amend their complaint.

16 You have time to answer it, to do whatever
17 additional discovery you would want, and, if you wish, to
18 reopen the trial on that issue.

19 So the preliminary injunction will remain in
20 effect until that retaliation claim is litigated.

21 Obviously, the language will not be, as you
22 noted earlier, it's not that they cannot be fired for any
23 reason. It will be limited to they cannot be terminated
24 for -- I'm working on the wording of it. I don't have the
25 TRO in front of me.

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1 Do you have a copy of the TR0.

2 MR. HENNEFELD: I have it right here, judge.

3 (Handing.)

4 THE COURT: I think I'll continue the language
5 as written. I would just say until the retaliation claim
6 is litigated and is resolved by the court.

7 MR. NARDO: Judge, can you have a TR0 in a
8 preliminary injunction where there is no claim for a
9 permanent injunction?

10 THE COURT: There is a claim for a permanent
11 injunction. You just heard, they have asked to amend
12 their complaint to add a claim for retaliation, seeking a
13 permanent injunction. I have granted that.

14 They are going to reduce that to writing so that
15 you can answer it, but they have made that motion to
16 amend, which I have granted. So it is orally granted.

17 That is the situation we are in. I guess if you
18 are objecting to me entering the preliminary injunction
19 without seeing the language of it, I could extend the TR0
20 for another day for them to formally file an amended
21 complaint, if you prefer that, and then issue the
22 permanent injunction over the written amended complaint.

23 MR. NARDO: You mean preliminary injunction?

24 THE COURT: I mean preliminary injunction. If
25 you want to do that -- would you prefer to do that?

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1 MR. NARDO: I would prefer that.

2 MR. HENNEFELD: Your Honor, if I may, we may
3 need a little more time than that for the amended
4 complaint, just to craft our own relief issues in terms of
5 what we're seeking.

6 THE COURT: The TRO is good for 14 days from the
7 issue date, would be the maximum period.

8 The flip side, Mr. Nardo, is, just to take your
9 argument and twist it around for a minute. Your argument
10 is that it's no big deal; it's just an injunction to obey
11 the law.

12 Then your client can obviously consent to it and
13 to pay the money for you to answer it and litigate it, you
14 know, if --

15 MR. NARDO: He consented when, through his
16 representation, Congress passed an antiretaliation portion
17 of the Fair Labor Standards Act and that was an act of
18 consent.

19 THE COURT: That was. Congress also passed a
20 provision that says they're entitled to seek a permanent
21 injunction. So he can consent to that part of Congress's
22 act as well.

23 MR. NARDO: I'm just saying seek it as part of a
24 separate case, judge.

25 THE COURT: Well, that makes no sense because I

1 have already heard testimony in part in this trial as
2 relates to the claims as currently pending. It makes no
3 sense for them to tell them to file a separate complaint
4 and for me to issue a preliminary injunction in a separate
5 case. Because certainly if I was going to have to reopen
6 the trial, it would make sense that I reopen it and
7 already consider the evidence I have heard on the other
8 claim in this trial.

9 MR. NARDO: So if I can just get the procedural
10 aspects of this down. After the complaint, we put in an
11 answer.

12 What is the ultimate end game? Then you want a
13 trial on this issue, judge?

14 THE COURT: That be would up to you. You would
15 obviously be entitled to discovery of the new claim. If
16 you wanted any discovery, you would have a period of
17 discovery. You can take any deposition you want to take
18 of any people you think might have relevant knowledge.

19 If you wanted no discovery, or whenever you
20 completed discovery, you'd then be entitled to a trial on
21 that, at which time they appear to be using the testimony
22 that's already been given by the employees on this.

23 But you would have the right to recall those
24 employees, if you want to ask additional questions of
25 them, and to call any other witnesses on that claim. And

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1 you would have the burden of proof obviously at that
2 trial.

3 MR. NARDO: And the ultimate issue is for you to
4 decide whether or not there is a permanent injunction?

5 THE COURT: Correct.

6 MR. NARDO: How long does that last?

7 THE COURT: That would be permanent.

8 MR. NARDO: Okay.

9 MR. HENNEFELD: Your Honor, we're proposing all
10 other appropriate relief, including punitive damages, for
11 that retaliation claim.

12 THE COURT: So you are seeking punitive damages
13 on the retaliation claim as well?

14 MR. HENNEFELD: Yes, your Honor.

15 THE COURT: Okay. So punitive damages and
16 permanent injunctive relief.

17 MR. NARDO: How long can a preliminary
18 injunction extend?

19 THE COURT: That can extend until there is a
20 trial on the merits. Sort of like a TRO, which is limited
21 in duration. A preliminary injunction would extend until
22 the court has determined whether or not they have proven
23 their case. So it would last until the decision on the
24 trial.

25 MR. NARDO: Okay. I understand.

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1 THE COURT: Okay. So can you get it in by the
2 end of the week, then?

3 MR. HENNEFELD: The amended complaint?

4 THE COURT: Yes.

5 MR. HENNEFELD: Yes, your Honor.

6 THE COURT: So the amended complaint will be
7 filed by Friday, April 13.

8 And with that, I would ask that you put in a
9 formal motion for a preliminary injunction. You made the
10 oral motion, but I would just ask you to put in the actual
11 motion.

12 If you wish to put in anything else on that date
13 as relates to that, you can, but I obviously asked for a
14 preliminary injunction so I'm not requesting any
15 additional briefing.

16 MR. NARDO: And if we don't want further
17 discovery, your Honor would make a decision on a permanent
18 injunction, punitive damages, and whatever else they
19 request based on the record as it is.

20 THE COURT: Correct.

21 What I was going to do is hold a telephone
22 conference next week to rule on the preliminary
23 injunction. But I want to give you a chance, if you want,
24 to put in any papers on that issue before I rule.

25 Do you anticipate putting in anything in writing

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1 on that?

2 MR. NARDO: I'm sorry?

3 THE COURT: Do you anticipate putting anything
4 in writing on the preliminary injunction motion?

5 MR. NARDO: I can't tell at this time, judge,
6 but I know next week I have a trial down the hall. It
7 will take all week before Judge Wexler.

8 THE COURT: I was going to do this by phone, but
9 if you are in the courthouse you can stop on by.

10 MR. NARDO: It may not be. I guess it will have
11 to depend upon Judge Wexler's schedule. I guess at the
12 end of the day, I'll try to.

13 THE COURT: Either way. I talk to him every
14 day. We'll work it out.

15 MR. NARDO: Okay.

16 MR. HENNEFELD: Your Honor?

17 THE COURT: Not every day. Almost every day.

18 MR. HENNEFELD: Your Honor, could we have the
19 option to participate by phone next week?

20 THE COURT: Yes. I was going to do it with
21 everybody by phone, But if he is going to be down the
22 hall, he can sit here.

23 For what we'll be doing, I don't really
24 anticipate any additional argument. I would just be
25 placing the court's ruling on the record. Okay?

1 What I will do is, maybe we will schedule that
2 subject to Judge Wexler's trial schedule.

3 Why don't we say 1:15 on Thursday, the 19th.

4 Does that comport with Judge Wexler's schedule? It won't
5 take more than 15 minutes. If you want to put anything
6 in, you can put it in by close of business on the 18th,
7 Mr. Nardo, letter or whatever you want to put in.

8 The court is extending the TRO until April 19,
9 at which time the court will rule on the motion for
10 preliminary injunction. So I want you to advise your
11 client of that, Mr. Nardo.

12 We will issue a written order today which
13 indicates that the TRO is extended until April 19. But
14 I'm not going to serve it on your client. I'm just going
15 to have you communicate that to him. Okay?

16 MR. NARDO: Yes, your Honor.

17 THE COURT: And I will briefly hear summations
18 from both sides. Or, if you want to, come back tomorrow
19 to do this. I will await the outcome of this other claim,
20 if you want to wait and do that at another time.

21 I was also going to give the Department of Labor
22 tomorrow if you wanted to supplement your proposed
23 findings of facts and conclusions of law to address both
24 the affirmative defense, which you had requested the
25 opportunity to do.

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1 And while you are doing that, now that you have
2 the testimony of the witnesses, if you wanted to, in your
3 findings of fact you have already submitted, reference the
4 transcript or exhibit that supports that particular
5 finding, just add that to the one you have currently
6 submitted, that will be helpful to the court.

7 MR. HENNEFELD: Yes, your Honor.

8 THE COURT: Mr. Nardo, do you want, I'm not
9 requiring it, but if you wanted to do that, you can as
10 well.

11 MR. NARDO: By when, your Honor?

12 THE COURT: Well, that's what I was going to
13 address.

14 I'll give you the option, if you want to, to sum
15 up now on these claims and then set a date for those
16 supplemental submissions. Or we can hold off on
17 summations, prepare those supplemental submissions and you
18 come back and do summations at that point. That is up to
19 you.

20 MR. NARDO: My preference would be to sum up
21 now, judge.

22 THE COURT: Okay?

23 MR. HENNEFELD: We're fine with that, your
24 Honor.

25 THE COURT: Okay. Obviously, the plaintiffs are

Summation for Government/Mr. Hennefeld

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1 first, the defendant, and then brief rebuttal.

2 MR. HENNEFELD: Your Honor, subsequent to that,
3 your Honor will set the date for submitting supplemental
4 findings?

5 THE COURT: Correct.

6 MR. HENNEFELD: Your Honor, I will keep this as
7 brief as possible.

8

9 SUMMATION FOR GOVERNMENT

10

11 MR. HENNEFELD: I will keep it brief, as the
12 overwhelming evidence that we have presented in this case
13 supports the elements of our claims and defendants have
14 presented virtually no defense to our claims.

15 In particular, at the heart of the case, the
16 employees' testimony and other evidence has shown that the
17 employees have worked significant overtime hours in excess
18 of 40 hours per week and have not received overtime
19 premium pay. Defendants have admitted paying a fixed
20 weekly salary without premium pay. And the employees have
21 testified to schedules that are well in excess of 40 hours
22 per week. For some of these employees, the salary they
23 received didn't even meet the minimum wage based on those
24 numbers of hours per week.

25 The recordkeeping violations are also clearly

Summation for Government/Mr. Hennefeld

1 established. The defendants have essentially conceded the
2 violations, and their failure to keep records and the
3 records that they did produce were clearly inaccurate and
4 falsified.

Excessive evidence has been presented as to the willfulness of these violations, including the submission of falsified records to the government, just referenced, and certainly exemplified by the continued noncompliance of defendants this long years after the investigation and lawsuit, and compounded by the bad faith exhibited by the defendants, including encouraging employees to lie to the government about their employment and to lie about their hours worked, and most recently issuing retaliatory statements to the employees, threatening to discharge them for testifying, as we have heard, all this is clear evidence of the willfulness of the violations; and, as discussed, also justifies permanent injunction against the defendants.

With respect to damages and back wages owed, plaintiff has provided a reasonable estimate of those back wages based on the employees' testimony of hours worked and their pay, as well as the defendant's admissions in discovery about pay and periods of employment.

Under FLSA case law in the Mount Clement case,
the burden shifts to the defendants, who have failed to

Summation for Government/Mr. Hennefeld

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1 keep accurate records to rebut the reasonable inferences
2 from that evidence. And defendants have certainly failed
3 to do that.

4 The one issue that the defendants contested
5 somewhat vigorously was the executive exemption defense,
6 which we will be submitting further findings and briefings
7 on. We do intend still to brief the waiver issue.

8 We believe the defendants have waived that
9 defense by failing to raise it until trial. But even on
10 the merits, the defendants clearly did not meet the
11 required elements to establish the executive exemption.
12 They certainly did not establish that the chef hired and
13 fired employees at the restaurant. They didn't establish
14 that his duties consisted of regularly directing multiple
15 employees of restaurant. They did not establish that the
16 chef had management as his primary duty.

17 Based on such factors as the amount of time
18 spent performing his exempt work, it is clear that what
19 the chef was primarily doing was cooking and preparing
20 food, which is not exempt work.

21 So the one defense that the defendants have an
22 affirmative burden to establish, they were not able to
23 establish it. And on every other issue, there is either
24 no dispute or overwhelming evidence in our favor that the
25 defendants failed to rebut it.

Summation for Government/Mr. Hennefeld

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1 And, just as I mentioned, in addition there is
2 no dispute that the defendants are employers, no dispute
3 as to employer status, no dispute as to coverage of acts.

4 And once again: Relief. We are seeking the
5 back wages, for which we provided a reasonable estimate;
6 and additional equal amount in liquidated damages, which
7 is certainly justified as the defendant did not meet the
8 good-faith provision for liquidated damages in light of
9 the evidence of the willfulness of their violations.

10 And, as discussed, we're also seeking permanent
11 injunction relief against the defendants for, not only the
12 pay violations, but subsequently for the retaliation
13 violations.

I would also just note, with respect to injunctive relief on retaliation, for permanent injunctive relief, that even putting aside our amended claim on 15(a)(3), it's always within the court's equitable discretion to grant permanent injunctive relief on that issue.

20 And that is all I have, your Honor. Thank you
21 very much.

22 THE COURT: Thank you. Just one second,
23 Mr. Nardo.

24 | (There was a pause in the proceedings.)

25 | THE COURT: Go ahead, Mr. Nardo.

Summation for Defense/Mr. Nardo

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1 MR. NARDO: Thank you, your Honor. I would like
2 to say, it was a pleasure to litigate the case before your
3 Honor.

4 THE COURT: Thank you.

5 Let me just indicate, given the lateness of the
6 hour and given opening statement, I don't want to hear
7 anything about doesn't the government have anything better
8 to do as your defense.

9 As you know, it is not really relevant. So
10 let's focus on the claim. Okay?

11 MR. NARDO: Let me withdraw that first comment
12 then, judge.

13

14 SUMMATION FOR DEFENSE

15

16 MR. NARDO: All right. The first witness you
17 heard from was Mr. Torres, who was recommended by his
18 cousin. And his cousin had no complaints about the place.

19 Mr. Torres testified, you'll find this in the
20 transcript, it was never past 9 pm that he worked Monday
21 to Wednesday. And the chef left before him. All right?

22 You have two issues here, judge: the hours and
23 the exemption.

24 Another witness you heard from was
25 Richard Gluszak. If anyone had an axe to grind against

Summation for Defense/Mr. Nardo

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1 Luigi Quarta, it is somebody who has a \$500,000 judgment
2 against him. He is not a friendly witness to Luigi
3 Quarta. And that \$500,000 judgment came out on
4 cross-examination. I didn't even bring that out, judge.

5 I submit to you that he told the truth about the
6 hours. He was there from 2001 to 2007. 2007 is well
7 within the statute of limitations, because his case was
8 filed in 2009. And that he told the truth about the
9 hours.

10 As far as the exemption, you heard testimony
11 from Juan Cantos Carlos Chevez or Juan Carlos Cantos
12 Chevez, that Pastor was in charge of the kitchen. Someone
13 has to be in charge of the kitchen. Luigi Quarta is not
14 in charge of the kitchen, other than in a very vague way,
15 but he is not -- he is in charge of the whole restaurant
16 which includes the kitchen.

17 But as far as directing the terms and conditions
18 of employment and supervising employees in the kitchen,
19 that was the chef. And I want to read to you from
20 Mr. Banegas' deposition, which is in evidence, and I'll
21 just read quickly from page 38 on. I won't give the line
22 number, page numbers.

23 *If there was something specific that had to be
24 cleaned or something specifically that had to be washed,
25 would anyone tell you to do that?*

Summation for Defense/Mr. Nardo

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1 Yes.

2 Who?

3 *Pastor. And sometimes if there was something*
4 *inside, then the boss would come, which is Luigi Q.*

5 *Was Pastor your direct supervisor?*

6 *In the kitchen he was.*

7 *Did Pastor also supervise Jeffrey?*

8 Yes.

9 *Did Pastor also supervise Juan Carlos?*

10 Correct.

11 So I submit to you that the testimony of
12 Mr. Chavez and Mr. Banegas established, and the
13 common-sense factors, somebody has to be in charge of the
14 kitchen. And Pastor said he was the most experienced
15 person there. And in writing it says that he was in
16 charge of the kitchen.

17 I submit that that establishes that
18 Mr. Alfaro -- the chef, whoever it was -- is exempt from
19 the Fair Labor Standards Act.

20 The testimony of the employees was all over the
21 map, judge. Interestingly, the only employees who
22 testified that Mr. Quarta was fluent in Spanish or spoke
23 Spanish were the employees who claimed having been
24 threatened by Mr. Quarta. But the other employees
25 testified that they couldn't even have a conversation with

Summation for Defense/Mr. Nardo

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1 Mr. Quarta because Mr. Quarta didn't speak the same
2 language as they did.

3 And you would think, after meeting with the
4 Department of Labor, after meeting once, twice, three
5 times, after then, that the employees, knowing that their
6 hours -- that there is a litigation going on about their
7 hours and about minimum wage and overtime, to think that
8 maybe they would at some point keep some written records.
9 Maybe the Department of Labor would then have something to
10 base their calculations on.

11 At no point in time did any of these employees
12 ever keep written records. I'm not saying that it's their
13 obligation to do so, judge, but knowing the case, knowing
14 the conversations, knowing all this cloak-and-dagger stuff
15 going on in the back of the restaurant, talking with the
16 Department of Labor, at some point you would think that
17 they would memorialize when they're going and when they're
18 leaving.

19 Mr. Chevez also left the restaurant and came
20 back. So how bad is he being treated if he wound up
21 coming back and is still working there today?

22 As you know, Mr. Quarta has been adjudicated
23 bankrupt. No prospect of a serious recovery here. And to
24 the extent -- you have your testimony from Mr. Torres, you
25 have the deposition of Mr. Banegas, you have the testimony

Summation for Defense/Mr. Nardo

1 of Pastor, you have the testimony of Miss Vasquez. It was
2 not my client's idea to drag current employees in a very
3 small business -- he has three employees in the kitchen --
4 into the courtroom.

5 And that is the stuff you don't want to hear.

6 THE COURT: Exactly. See, I knew it was in
7 there.

8 MR. NARDO: It's paid off.

9 It's also a private bar to litigate these
10 matters, judge. And you see these cases all the time,
11 every day. And I admit to you that there was some radical
12 decision-making if there was a private party.

13 And I will say, judge, that I think you should
14 take into account, to some extent, the secret, clandestine
15 surveillance and snooping going on in a private workplace
16 behind the employer's back.

17 So I submit to you that you have two issues to
18 decide here: the exemption and the hours. Whatever
19 number you come to as far as the hours worked for each of
20 the employees, on behalf of the defendant I ask you to
21 divide by two.

22 Thank you, your Honor.

23 THE COURT: Okay.

24 MR. HENNEFELD: Well, your Honor, I'm not sure
25 about where that divided-by-two formula came from.

Rebuttal for Plaintiff/Mr. Hennefeld

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1 THE COURT: I was going to ask, but I decided
2 just to leave it alone.

3 MR. HENNEFELD: That might be best, your Honor.
4 I will just very briefly address a few of these issues.

5

6 REBUTTAL FOR PLAINTIFF

7

8 MR. HENNEFELD: Mr. Torres clarified his
9 testimony that he did often leave past 9 on the earlier
10 nights of the week and certainly left well past 9 on later
11 nights of the week.

12 Mr. Nardo is talking about Mr. Gluszak, as you
13 know a witness of unimpeachable credibility, who is, you
14 know, one of Mr. Quarta's biggest enemies, would never
15 testify in his favor.

16 Our cross-examination showed his potential bias
17 here: The half million dollar judgment against him by
18 Mr. Quarta. That Mr. Quarta has not enforced it against
19 him certainly would ensure a strong mixture of gratitude
20 and/or guilt for that. Not to mention the fact that
21 Mr. Gluszak admittedly hasn't been at or near the -- at or
22 in the restaurant in five years.

23 As to the exemption issue, Mr. Nardo didn't even
24 mention authority to hire and fire, which defense clearly
25 hasn't shown, and that is a required element to meet the

Rebuttal for Plaintiff/Mr. Hennefeld

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1 exemption.

2 Additionally, even assuming some of what
3 Mr. Nardo's arguing about Pastor having some supervising
4 of kitchen employees, he certainly did not direct the
5 terms and conditions of their employment, as Mr. Nardo
6 states.

7 It is clear that Mr. Quarta was the one in
8 control of terms and conditions of employment, and it is
9 also clear that the supervising and managing of employees
10 was not the chef Pastor's primary duty.

11 Again, the defense raises the issue of the fact
12 that the employees hadn't kept records. And certainly
13 that is irrelevant. It is not the employees'
14 responsibility to keep records, in keeping with defendant
15 blaming the DOL for not keeping accurate enough records in
16 its case diary when it was clear that the spotlight and
17 the finger should be pointed at the defendants for failing
18 to keep accurate records of their own, which is clearly
19 required by law.

20 And one of the consequences of failing to do so
21 is that the burden shifts to them in this case to rebut
22 the reasonable inferences from the evidence here. And the
23 evidence of the hours that the workers have worked and
24 their schedule has been very consistent and clearly shows
25 that they worked well in excess of 40 hours. And the

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1 defendant has not been able the rebut that evidence.

2 Thanks.

3 THE COURT: Thank you.

4 Let me just say on the issue of being compelled
5 to address this issue of the argument that you made,
6 Mr. Nardo, regarding the decision to pursue this case in
7 light of your client's financial circumstances.

8 The enforcement of these laws, as you know, is
9 extremely important. And it's not a defense to say I'm a
10 struggling restaurant owner, you know, leave me alone.

11 These cases are important. It's important that
12 everyone comply with these laws whether they are
13 struggling or not, and that is why it is relevant.

14 And I just feel compelled to emphasize that to
15 the defense. I don't know whether you want to resolve the
16 case. That is between the parties. But in terms of the
17 decision to continue to pursue this case, I don't think
18 you can reasonably question why the Department of Labor
19 would pursue these types of cases when violations are
20 occurring.

21 I'm not really asking for your response, as I
22 see you edging up to the microphone. I think you had your
23 15 minutes in the opening to state your piece. I felt
24 compelled to at least put that on the record because I
25 think it is important to assign the importance of these

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1 laws even when you have businessmen or restaurant owners
2 who are facing certain financial circumstances.

3 But in any event, why don't we set a date for
4 the submission of any further proposed findings of fact
5 and conclusions of law based upon the trial testimony.

6 You can get the transcript in about a week or
7 so. How long do you want to put that out?

8 MR. HENNEFELD: Can we have three weeks from the
9 transcript, your Honor?

10 THE COURT: Sure. 30 days from today. May 10.

11 MR. NARDO: I'm going to be out of the country,
12 judge, from the 2d to the 8th, so could I just get the
13 following Monday?

14 THE COURT: May 14.

15 MR. NARDO: We're not required to submit.

16 Right?

17 THE COURT: Correct.

18 MR. NARDO: And I don't know if my client can
19 afford the transcript, so I will have to run that by him.

20 THE COURT: That is why I'm not requiring you to
21 submit.

22 MR. NARDO: Can we submit without the
23 transcript?

24 THE COURT: Sure.

25 MR. NARDO: Okay. Because being in the private

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1 sector, my client might want to conserve his resources,
2 judge, and may not want to spend money.

3 THE COURT: Fine. All right.

4 We will have a phone conference next week on the
5 preliminary injunction motion. I would urge you to try to
6 seek some way to resolve that issue without both sides
7 having to expend additional time and money litigating
8 that, but I'll leave that to you.

9 I do want to compliment both sides. I
10 appreciate the efforts that were made to try to streamline
11 the case. We were able to get it done within two days and
12 it was a pleasure to preside over the trial.

13 MR. NARDO: Thank you, your Honor.

14 THE COURT: Have a good day.

15 One more thing. On the record, I did sign an
16 order that extends the TR0 until April 19. My clerk will
17 give you copies of that now. Okay?

18 Thank you.

19 Just make sure, Mr. Nardo, your client gets a
20 copy of that.

21 MR. NARDO: I will, your Honor.

22 (Proceedings concluded at 5:00 pm.)

23

24

25

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1

I N D E X

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